

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals, District of Columbia

OCTOBER TERM, 1910.

No. 2196.

757

WILLIAM H. HUTCHINSON, APPELLANT,

vs.

CAPITAL TRACTION COMPANY, A CORPORATION.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED JULY 26, 1910.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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APPELLEE.

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In the Court of Appeals of the District of Columbia.

No. 2196.

WILLIAM H. HUTCHINSON, Appellant,
vs.
CAPITAL TRACTION COMPANY, a Corporation.

a Supreme Court of the District of Columbia.

Law. No. 51179.

WILLIAM H. HUTCHINSON, Plaintiff,
vs.
CAPITAL TRACTION COMPANY, a Corporation, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Second Amended Declaration.*

Filed March 15, 1910.

In the Supreme Court of the District of Columbia.

Law. No. 51179.

WILLIAM H. HUTCHINSON, Plaintiff,
vs.
CAPITAL TRACTION COMPANY, a Corporation, Defendant.

Comes now the plaintiff, William H. Hutchinson, and with leave of the Court first had and obtained, files this, his second Amended Declaration herein; Plea to the first Amended Declaration not having been made.

The plaintiff, William H. Hutchinson, sues the defendant, the Capital Traction Company, a corporation, for that heretofore, to wit, on the 29th day of March, 1908, and at the time of the

grievances hereinafter mentioned, the Capital Traction Company was a street railway corporation, having an office, and agents doing business in the District of Columbia and operating its cars along certain streets and avenues in the City of Washington, District of Columbia, for the transportation of passengers; that it then and there became and was the duty of the defendant corporation to carefully and safely transport passengers riding on its cars, and on, to wit, the 29th day of March, 1908, when plaintiff was a passenger upon one of the cars of the defendant corporation on what was

known as its Fourteenth Street Line, and had paid his fare
2 as such passenger, it then and there became and was the

duty of the said defendant corporation to carry him safely as such passenger, and safely allow him to get off said car at his alighting destination; but notwithstanding its said duty in this regard, and when the car upon which the plaintiff was going South reached its regular stopping place near the corner of Fifteenth and G Streets, Northwest, said plaintiff, himself in the exercise of due care, sought to alight therefrom, and in so doing, with due care and caution on his part, and while still a passenger, was violently thrown from said car to the ground by and through the negligence and incompetency of the officers, agents or servants of said defendant corporation, who were then and there in charge and control of said car, and as well of the safety of its passengers alighting therefrom, as aforesaid, and was thereby permanently injured by having his thigh and hip badly fractured and broken, whereby his leg became shortened, and he became and has remained, and will continue to remain, a helpless cripple, utterly incapacitated from all work, and his nervous system was permanently shocked, impaired and deranged, and he was thus and otherwise shocked, bruised, hurt and injured, and became and was sick, sore, lame and disordered, and so remained for a long space of time, to wit, hitherto, and will so remain in the future, during all of which time the plaintiff suffered, and will continue to suffer, great pain, mental distress and anguish from the injuries thus occasioned his whole system; and further by reason thereof, the plaintiff lost his position with the United States Government and its accompanying

salary from April 1st, 1908, up to the present, and will continue so to lose the emoluments therefrom in the future,
3 whereby he has been specially damaged in, to wit, \$10,000.00, and the plaintiff has been further specially damaged by reason of his hospital expenses, doctors' services and nurse hire, in, to wit, \$500., and said plaintiff has been forced to lay out and expend money for medicines, drugs, linaments and ointments, in and about his endeavor to be healed and cured of his said injuries, hurts, bruises, wounds, and cuts so as aforesaid occasioned him, to his further special damage in, to wit, the sum of \$100., and said plaintiff has accordingly been damaged in all, in the sum of \$20,000.00, which amount he claims of said defendant corporation, besides costs.

HARRY J. SWEENEY,
LEONARD J. MATHER,
Att'ys for Pl'ff.

(Endorsed.)

Leave to file the within Second Amended Declaration is hereby granted.

HARRY M. CLABAUGH,
Chief Justice.

We consent that this be filed in lieu of all previous declarations.
R. ROSS PERRY & SON.

4

Plea.

Filed December 8, 1908.

* * * * *

The Capital Traction Company, the defendant in the above entitled cause, for a plea to the declaration of the plaintiff, William H. Hutchinson, heretofore filed therein, says that it is not guilty in the manner and form therein alleged.

R. ROSS PERRY & SON,
G. THOS. DUNLOP,
Attorneys for Defendant.

Joinder of Issue.

Filed December 9, 1908.

* * * * *

Plaintiff joins issue on the Plea of defendant heretofore filed herein.

LEONARD J. MATHER,
H. J. SWEENEY,
Attorneys for Plaintiff.

Memorandum.

March 24, 1910.—Verdict for Defendant.

5

Supreme Court of the District of Columbia.

FRIDAY, April 8th, 1910.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * *

Upon consideration of plaintiff's motion for a new trial filed herein, it is ordered that said motion be, and the same is hereby overruled, and judgment on verdict is ordered: Wherefore, it is considered, that the plaintiff herein take nothing by this action, that the defendant go hereof without day, be for nothing held, and

recover of plaintiff its costs of defense, to be taxed by the clerk and have execution thereof.

From the foregoing judgment, the plaintiff by his attorney in open court notes an appeal to the Court of Appeals of the District of Columbia, whereupon, the penalty of a bond for costs is fixed in the sum of One Hundred Dollars.

Memorandum.

April 26, 1910.—Appeal bond approved and filed.

6 Supreme Court of the District of Columbia.

MONDAY, *June 13th*, 1910.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * *

Upon consideration of plaintiff's motion filed herein by his attorney of record and consent of defendant indicated thereon by its attorneys, the time within which to file a transcript of the record herein in the Court of Appeals of the District of Columbia, is hereby extended to and including the 1st day of August, 1910. Further the time within which to submit the Bill of Exceptions herein is hereby extended to and including the 27th day of June, 1910.

FRIDAY, *June 24th*, 1910.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice presiding.

* * * * *

Come now the parties hereto by their respective attorneys of record; whereupon, the bill of exceptions taken at the trial of this cause is submitted by attorney of record for the plaintiff and prayed to be signed and made of record nunc pro tunc, which is accordingly done and hereby so ordered.

7

Bill of Exceptions.

Filed June 24, 1910.

* * * * *

Be it remembered that this case came on for hearing on the 23rd and 24th days of March, 1910, before the Honorable Harry M. Clabaugh, Chief Justice of the Supreme Court of the District of Columbia, and a jury.

And thereupon, after the jury had been duly sworn, the plaintiff to maintain the issues on his part joined, testified on his own behalf as follows: I am the William H. Hutchinson who was hurt

on a car of the Capital Traction Company on the night of March 29, 1908; I am 83 years and 8 months old—in my 84th year at the present time; on March 29th, somewhere about nine o'clock, I boarded a 14th Street Capital Traction Company's car at 14th and Monroe Streets, taking a seat in the forward car up close to the motorman's platform, the first seat on the east side. Nothing occurred of any consequence until we got below Thomas Circle, when the conductor said something about "transfers for Georgetown." I asked for a transfer and received it. The car swept along and turned New York Avenue into Fifteenth Street, near the junction of G, and stopped. I did not make any effort to rise until I was positively sure that the car had stopped. I was going to take the Georgetown car. I lived on 17th Street about the middle of the square, in the Army and Navy block. It was between nine and

8 ten o'clock; somewhere about a quarter past nine or half past nine; somewhere about there. When I was positive that the car had stopped I had nobody to look after but myself, and I arose and walked down the car very slowly, past the conductor in the center of the car. There was a passenger nearly opposite to him on the other side, the same side that I was on. There was another passenger in the corner on the same side. I slowly passed down, and as I passed the conductor I looked directly in his face. I do not know why. I passed on to the end of the car, on the platform. I do not know what induced me but I turned around and looked in the car. The conductor was in the same situation, in the act of laying his hand upon the bell-rope. Not only that but the motorman was peeping through the window. Evidently they were in a hurry to go. As I wheeled about I saw a train coming up north for Georgetown. The thought occurred to me and I walked towards that car and held on to the iron rod that supported the roof of the car, and I looked out. I saw it was dangerous, because there was a barrier there. I wheeled about and went west towards the exit, and looked in the car again. I saw the conductor in the same position. Not only that, I saw the motorman looking in the window at the forward part of the car. I moved forward two steps, took hold firmly of the stanchion with my left hand and stepped off with my right foot directly on to the step below. I had my foot lifted, my left foot in mid air, and quicker than a flash I was lying right under the car, right under the woodwork of the car, along side of the moving wheel. I was alarmed, because those fingers (indicating) were within a- inch of being crushed because they

9 were on the cold iron track, and that wheel was moving. I was shocked and frightened. I said "I am in danger here, sure"; but I looked at the wheel, and not only that, but I put my hand on the rear part of the wheel to satisfy myself by feeling that the wheel was in motion. I hurried up, just as quick as I could get out of that hole. I do not know how I got out. The Lord helped me. Nobody else did. My leg was broken, and I moved as best I could about two feet from the car and I rose, thank heaven, erect like a man, and I looked in that car window and saw the conductor in exactly the same position that he was in when I came

down the car. I ought to say here that when I fell I heard the bell signal for the car to go on; and not only that, I heard the lifting of the brakes, and I heard the connection of the electric power to the track, as distinctly as if I had been on the forward platform. But as I say, I got up within probably two feet of the window. I did not dare touch the woodwork. I looked in the window. I did this (indicating) with my right—my left—hand, Oh! I suppose a half a dozen times, and probably more. I saw the conductor, but it did not seem that he saw me. What threw me the second time I do not know. I seemed to be moved on a pivot. Of course I had nothing but this right leg. I was completely turned about and fell into the street I judge fully eight feet from the car. It was the first groan that escaped me. I hurt myself fearfully. I felt it. There was an electric light just behind me that shone directly into that window, and photographed, as it were, the conductor at the bell rope. The lights are abundant all around there. He

10 saw me striving to get on my feet. I am satisfied of it.

When I got into a sort of half-sitting position looking straight at that window and him, my eyes and his eyes were exactly focused and I did not make with both hands but one or two motions and he was on the platform in an instant. The conductor with his assistant each took an arm and carried me across the street and laid me down on the Treasury sidewalk. Then a policeman came up and with his two assistants made a chair in front of them while the third man lifted me gently into that position. I put my arms about both of their necks, and I was carried right over to the store—the drug store—Thompson's I think. While I was in there some philanthropist gave me a glass of soda water, I guess clear. Oh! what a relief that was. Then I was put in an ambulance and taken to the Emergency Hospital. I was immediately disrobed and placed on an iron cot; and I complained terribly. It seemed as if every particle of blood in my whole system was frozen solid. I was shaking. A canopy was placed over the top of the bed and a fire was lit in the rear and the great flames were rolling over me. Oh! how good that was. I knew nothing after that—not a thing. Everything was blank. I was at the hospital six weeks; about a few hours less than six weeks. I had two expert doctors; Dr. Carr and Dr. Atkinson. They were constantly in attendance with me. I suppose the most extreme suffering that I endured there was for the want of sleep. I was in agony and pain from morning till night and from night till morning. I do not think there was an

11 hour but that I was in fearful pain and suffering. The want of sleep was the most agonizing part.

(Plaintiff then details his suffering and testifies that he has never been able to use his leg since; that he has to go about with a crutch and that he is in constant pain and suffering.)

Whereupon Dr. WILLIAM P. CARR and Dr. WADE H. ATKINSON testified in detail as to the plaintiff's injuries and the permanency thereof, stating that he had an impacted fracture of the femur at the hip joint—an intra-capsular fracture with a shortening of the

leg—and that accompanying this there was an injury to the sciatic nerve which had caused the acute pain from which the plaintiff had suffered.

Whereupon the plaintiff further testified on his own behalf that at the time this accident happened to him he was in first class fighting order, saying "I would dare anybody to dispute my ability to do any kind of work that came in my line."

On cross-examination the witness testified as follows: I was born on the 26th day of July 1826 and was employed at the State Department when this accident happened—in the State Department Printing Office as a Compositor; I had been out to dine with my daughter and son-in-law at 3487 Holmead Avenue, and I was on my way home. The train was composed of two box cars similar to those in which I had ridden hundreds of times; one side was blocked by a barrier. Of course I saw that that night when I went over to look. A gate is supposed to be there but I have seen it many

12 a time when there was no iron gate there on a box car; I sat in the first seat up close to the motorman's platform facing west. The car stopped opposite G Street. I waited until the car had come to a full stop before I got up out of my seat. I was positive that car was as dead as a rock. When I arose from my seat to alight from the car I was not particularly anxious or in a hurry to get the Georgetown car. I was willing to take my time. There was no car on the track at all until the Georgetown car came up, and when I got on the platform I saw with my eyes that was the car that I wanted but it was unsafe to take it. I noticed about the middle of the car, and just below the center position where the conductor was, there was a passenger—a gentleman I presume—a white man; and in the corner, the last seat, there was a woman; whether she was white or colored I don't know, and opposite in the other corner there was another woman. I couldn't tell you whether she was black or white. These three and myself were all the passengers that were in the car. The conductor was in the center, or nearly the center of the car, with his hand apparently on the bell-rope. When I first got up there he was standing there. I don't know whether he was looking at me, but I looked at him when I passed him. I don't know why I looked at him—I thought he was too young a man to have charge of so responsible a job at that time of night. That is what struck me. I had already gotten my transfer and the conductor could not help but see me. Then I went down the aisle and just as I got at the platform, I wheeled about and looked in the car and saw just what I have stated—the

13 motorman looking in the window and the conductor in the center of the car. The motorman was peering through the window. I won't say there was an iron gate on my car. I don't remember seeing it. But there was on the new train that came up; I saw it very plainly. I saw this Georgetown car coming up on the other track, and I saw very conclusively that I could not catch that car and then I turned around and passed again in front of the door of the car and looked in again and the conductor was

still in the same position with his hand on the bell-rope. Every time I looked in that car the motorman was peeping in the window. I looked twice. Then I attempted to get off the car as quick as I could. I passed my right foot down as solid as I could on the step—on the first step below the car platform and held the stanchion firmly in my left hand. The Georgetown car had been halted and passengers were getting out and in. I was not intending to take that car. It had stopped firmly in its place. I had no occasion to see it—I had no interest in the car. I didn't know anything about it.

Q. Very well. Now, as you passed out, going over towards the Treasury side, and stood there with one foot on the step, and holding on to the stanchion, did you or not know whether the car was moving. A. I will take a double oath when I got my left foot in mid-air, to step down on the street, there was not any motion until I was pulled right over just like a flash of lightning. Just as I was stepping down and was thrown under the car, I heard the bell just as distinctly as if I was on the front platform.

Q. You at that time had already gotten down to the step,
14 and you were going from the step to the ground? A. Yes, sir.

Q. When the two bells were given and the car started did it start as quickly as that? A. Just as quick as a flash. I put my hand on the rear part of that cold iron wheel, and I felt the motion in my fingers, and I had the assurance of my eye sight and my feeling that that car was in motion as I was flat on the ground, my head above the car wheels. The car was going, and I put my hand on the wheel to satisfy myself that this was going. Just as I was falling down I heard that bell, and I heard the noise of the motorman in the front car. I was not senseless. I somehow or other was clear headed for an old fellow. I heard the two bells given to start the car and I heard the brakes disengage from the wheel, and then I put my fingers on the moving car wheel. I was perfectly sensible; perfectly conscious; I knew what I was doing. While I was on the rear platform of the front car it seems to me as if there was somebody getting off the second car—the front platform of the second car. I think it was a woman.

Q. Did the woman get off before you fell? A. Let me see; let me see. Did she get off? I couldn't say; I couldn't answer that question honestly.

Mr. Perry thereupon read to the jury a statement which had been signed by the plaintiff as follows:

“On M'ch 29, 1908, about 8.30 o'clock P. M. I was a passenger
15 in a south bound 14 st., car and seated in the forward part of the closed motor, close up to the motorman. While the car was slowing up for a stop at 15th and G. St. Junction I walked to the rear platform and by the time I reached the platform I think the car had come to a stop but I could not swear to that. I stepped down to the lower step and then I found that the car was in motion, the car had evidently started while I was stepping from the platform to the step. I stepped to the ground and as soon as

my foot touched the ground I felt the car was in motion. I do not think I was holding on to the handle at the time. I fell to the ground and the car came to a stop within about two feet after I fell. The conductor at the time was in the front part of the closed motor and he came to my assistance. There was only about two other passengers in the motor and a lady left the car after I had fallen. I do not know who that lady is but the conductor took her name. I cannot recall if the conductor rang the bell to start the car or not while I was in the act of getting off.

WM. H. HUTCHINSON.

MRS. E. M. ATEN,
3497 Holmead Pl.
Apr. 1st, 1908."

The witness further testified that he remembered distinctly signing the statement at the hospital on the third floor front. How he (the claims' agent) got there, doesn't know. That Mrs. E. M. Aten is his daughter.

On redirect examination the plaintiff further testified as
16 follows:

I recall that the door through which I passed before stepping on the platform was open wide. With regard to this statement it was just as I was recovering from unconsciousness on that Monday, when my room was full of men. As soon as the faculty,—the doctors of the institution—had retired, a man entered the room and gave his name, and said he was a representative of the railroad company. Well, I was about in as fit condition to talk of the accident as a man in China. I didn't know where I was. I couldn't tell just what happened; neither could I tell what the doctors were talking about ten minutes before; they were trying to find out how old I was and if I had had any sickness in early life. This representative of the Capital Traction Company wished to get my statement as to the accident. Well, I couldn't have told anybody correctly as to the accident; I couldn't have done it. The statement as read by Mr. Perry is wrong. There are several bold blunders in it.

"Q. Now I am going to take this statement up seriatim with you. Omitting the formal part:

'While the car was slowing up for a stop at 15th and G St., Junction, I walked to the rear platform, and by the time I reached the platform I think the car had come to a stop.' Did you say that to him? A. I could not swear to that. I could not say "yes" nor "no"; I don't know.

Q. 'I stepped down to the lower step and then I found that the car was in motion.' How about that? A. That was un-
17 truthful; that was not true in any sense of the word—not true; not a particle or bit of truth in it.

Q. 'The car had evidently stopped while I was stepping from the platform to the step.' Did you say that? A. From the platform to the step?

Q. Yes. A. I was safely moored on the first step, but the car started while I was going down the second. That is the exact truth.

Q. 'I stepped to the ground and as soon as my feet touched the ground I felt the car was in motion.' What about that? A. Oh, fiddlesticks! Nothing of the kind. I lay prostrate right alongside of the wood-work of that car in less than a second.

Q. 'I do not think I was holding on to the handle at the time.' Did you say that? A. Oh, that is a falsehood!

Q. 'I think that is all I care to call your attention to. That statement purports to have been witnessed by your daughter. She was there at the time, was she? A. She came in weeping as if her heart would burst while this conductor was writing.

Q. After the statement was written by this conductor, or this representative of the Capital Traction Company, was it read over to you? A. I think so. It might have been in Greek or Latin as well as anything else. I could not understand it at all.

18 I repudiate the whole statement from beginning to end, because it is untruthful.

Q. What was your condition at that time with respect to pain? A. Oh, heavens! I was just recovering consciousness, I was trying to find out where I was. It must have been along about the noon hour of Monday. I was looking at the position of the sun from the window, and I could not make out why so many men were in the room. The doctor was on my right with a tablet and pencils, and at the foot of my bed were a good many more fine-looking gentlemen. They seemed to be talking among themselves. I could not understand a word they said, and the more I looked on the more confused I was."

On recross-examination the witness further testified as follows:

"When the statement was being written down the doctors had retired. No one but the man taking the statement was in the room except myself, flat on the bed, and my daughter by my side. I had been trying to answer the questions that the doctors had asked me just before that; I don't know whether I answered them or not. I did a very foolish thing when I signed that statement. My daughter was in the room while the statement was being taken; she was there while it was being read over to me. She heard it read. When I signed it I think I told the man that I was in no condition to talk to him and please go away and leave me alone, although I won't swear to it. I don't know. I did not ask him to clear out.

19 I had more courtesy than that. I don't know whether my daughter said 'don't you see my father is not able to talk to you; go away and come again;' it may be so, I don't know."

Whereupon the plaintiff further to maintain the issues on his part joined called as witnesses Dr. WILLIAM P. CARR and Dr. WADE H. ATKINSON; JAMES H. MILLER; Mrs. AMY HUTCHINSON and EVERETT M. ATEN who all testified respecting the injuries, pain and suffering of the plaintiff, and his remarkable activity of mind and body prior to the accident.

Next, thereupon, the defendant in order to maintain the issues on its part joined, produced as a witness ROBERT B. DICKEY who testified that he was a U. S. Mail Clerk—a transferring mail clerk living at Harpers Ferry, and was a passenger on the same car with the plaintiff when he was hurt; that he boarded the car at U Street going South; that the train was composed of two cars, one of which, the forward car in which he took his seat was a closed car; that he doesn't remember whether the other car was a closed car or not; that it was about half past eight o'clock when the accident happened as he was returning to his home at Harpers Ferry and was anxious to catch the train that left the Union Station at 9:10 P. M.; that the car stopped at 15th and G Streets, and witness was sitting on the right hand side of the car in the rear end, while the gentleman who was hurt was sitting in the front end on the opposite side; there were two other passengers in the car—two ladies—doesn't know what became of them; but they had left the car when it started again after the accident; that just before the car came to a stop the

20 gentleman who was hurt got up and walked to the end of the car—not the end where he was sitting, but the end where witness was sitting—and went out the door between the two cars; the car was moving when he was walking through the car, but witness was unable to say whether it had stopped when he got out on the platform and stepped off. That witness knows nothing about. Witness could hardly estimate the speed of the car; it was just simply moving along slowly. The conductor was on the other car, or between the two cars—one or the other—he was not in the car witness was in. Witness was anxious to hurry and catch his train and became a little uneasy at the delay, and got up to see what the trouble was, as they were not moving, and found the conductor assisting this gentleman up on his feet right at the steps of the car.

“Q. Had that car started after it stopped, before that? A. Oh, no; no, because I was very anxious for it to start.”

Cannot remember whether the conductor rung two bells—doesn't know; the old gentleman was down in a very stooping position, partly up, with the conductor raising him. He was just opposite the steps of the car where I suppose he stepped off—just the same as if he stepped right off the steps, and was right down by the steps. The conductor managed to get him across the street on the right hand side and then a policeman assisted the conductor and they carried him directly opposite again over to a drug store.

On cross-examination the witness further testified that he was not a U. S. Railway Mail Clerk but a railroad clerk, transferring mail from one train to another at the station at Harpers Ferry; that he was not a postal clerk. That he had been such railroad clerk for about 15 years. That on the night the accident happened there were four passengers in the forward car. the elderly gentleman, two ladies and witness; that he does not know where the conductor was at the time the accident happened but suppose he was in the last car or between the two cars; he was not in the front car; that he does not know whether the car had come to a standstill or not when the plaintiff got off.

Q. Did you notice the car jerking, Mr. Dickey, as it passed over the cut-outs just above where it stopped? A. I didn't notice any irregularity in the car at all.

The car did not go on until after the accident was over, and the old gentleman was taken to the drug store and the conductor returned and asked witness for his name; did not notice a Georgetown car abreast of the one on which witness was riding.

Q. You paid no attention to that? A. I paid no attention to any other car. My anxiety was to get over to the Station.

Q. Indeed you paid practically no attention to anything until you knew there was some trouble, did you, Mr. Dickey? A. My reason for going out was to find out whether they were going to start soon or not; otherwise I would have tried to make some other arrangements. I had to get to the Station and when I stepped out of the car I found this gentleman as I have just stated and the conductor assisting him to his feet. I offered to assist him up.

Q. And you paid no attention to what was going on until
22 after this accident happened and then you went out to see what the trouble was about as you were anxious to get to the Station? A. Yes, sir.

Thereupon, and further to maintain the issues on its part joined, the defendant produced SUSIE LEE (colored) who testified that she cooked, washed and ironed for W. V. Cox at Brightwood, and was a passenger on the same train with the gentleman who was hurt.

"What I recollect about the accident is, as I was getting up to go off of the trailer, the front door of the trailer, I saw an old gentleman falling from the step of the front car; and he had fallen to the ground before the car stopped; and the conductor rushed off the car and picked him up; picked him up before the car stopped; and after the car stopped I got off."

Witness was going to 21st Street, and was going to transfer there at Thompson's drug store to the F and G Street car; was in the trailer car—about midway of the trailer—and when she got up the car was moving; that as she walked to the front of the trailer and got out on the platform the car was still moving; that when she got out on the front platform of the trailer, the first one she saw was the old gentleman falling to the street; "he was falling when I first saw him; he was falling from the platform of the front car—the rear platform of the front car—it seemed as if his hand had given way and he lost his hold—his hand-holt; did not see him when he came out of the front car to get on the platform."

Q. How soon after he had fallen off did the car come to
23 a stop? A. Well, it was about a foot from him when it stopped, slowly stopping. I guess about a foot and a half from him when it stopped. Witness got off the car then, and the conductor asked her for her name and address which she gave. The conductor was assisting the old gentleman; he had jumped off the car and went towards the old gentleman who was lying towards the Treasury Department, with his head towards the Treasury Department. That is the way he fell. His body as it lay there passed by

the witness as she stood on the platform of the car; saw the conductor rush off the car; he jumped from the trailer—the front platform of the trailer car. After witness had gotten off, she went right around the back of the car and got the F and G car. The old gentleman looked very feeble to me; he looked to be quite an old gentleman—very feeble.

On cross-examination the witness further testified that the conductor was standing on the front platform of the trailer car while she was sitting down in the car; that she had arisen from her seat and had walked to the door of the car which was open, to change cars; did not see the old gentleman come out of the forward car, the motor car; he was on the step falling from the step when she first saw him.

Q. Which was the one (arm) that had been broken from the stanchion? A. This one (indicating the left arm). Did not notice any jerking of the car as it passed over the cut-out just about as it passed the corner; the car slowed around very gently, and stopped very gently; did not notice any jerking at all; the conductor was standing right on the front platform of the trailer car. The car had not quite stopped when witness got to the door of the
24 trailer car but it was going very slowly.

On redirect examination the witness further testified as follows.

Q. How long after the old gentleman fell off was it before the car came to a full stop? A. Well, the car was slowing down down. I suppose—well, then the gentleman fell off, the front car, by the time the car stopped, it was about a foot and a half from the old gentleman; so you can judge for yourself how long it was. It then came to a full stop and I got off.

Q. What was the last stop it made, if you recollect, before the old gentleman fell off? A. I don't remember anything about any stop at all. I was just looking out and seeing the people and different things. I wasn't paying any attention to the car whatever.

Thereupon LOUIS V. DIETER was called as a witness by the defendant to further prove the issues on its part joined, and he testified that on the night the old gentleman was hurt he was employed in Thompson's Drug Store; that the old gentleman was brought into the store by officer Putnam; that they sat him in a chair in the front part of the store, and asked him whether he would be sent to the hospital. He said no, that he did not think he wanted to go to the hospital, but officer Putnam told one of the clerks to call an ambulance. While they were calling the ambulance the old gentleman started to get up, and they tried to get him to sit down again and at last got him to sit down. Some asked him whose fault it was, and he said that he thought it was his own fault as far as witness remembers it. That the old gentleman was suffering a good deal at the time.

Thereupon, and further to maintain the issues on its part
25 joined, the defendant produced Augustus C. Putnam as a
witness, who testified that he was then employed by the
Capital Traction Company as an inspector but that at the time of
the accident he was a crossing policeman at 15th and G Streets,
Northwest; that he had been on that one crossing six years. That
a 14th Street car was going South on 15th Street. There was a
West bound car, a Pennsylvania Avenue car just pulling out West.
When this Avenue car pulled out of the way the switchman called
to me that there was trouble. He either said that there was trouble
or an accident, pointing towards the 14th Street car. Witness ran
over there and saw this old gentleman. He seemed to be very
feeble at the time. The conductor and witness carried him to
Thompson's Drug Store forming a chair with their hands. While
in the drug store witness insisted on the old gentleman going to the
hospital, on account of his condition, his feeble condition. He said
"no" he did not want to go, but witness saw he was in no condition
to go by himself and got one of the clerks to call the ambulance.
While witness was waiting for the ambulance the old gentleman
made the remark in the drug store that he thought the car had
stopped, and that he stepped off before it stopped, and that it was
his own fault, and he blamed no one. Witness when he went over
to the car found it standing at the proper place. There is a stop
plate there and it was standing at the stop plate. It was standing
with the fender over that stop plate. There was a West bound train
that had gone. When that passed out of the way, going West, the
switchman spoke to witness, who was on the East side of both
26 trains. The old gentleman when the witness first saw him
was standing about two-thirds of the way to the west curb
and nearly opposite the rear platform of the motor car. That he
was not over two feet out of line north of the direct line from the
step of the car to the West side. That it was the business of the
witness as a crossing officer when an accident occurred to take in the
situation of the car just where the car was, so that he could make a
report of it, as he had to do at the Station House.

On cross-examination the witness testified that he could not say
how long the 14th Street car had been at a standstill before his at-
tention was first attracted to some trouble, although he does not
think it could have been over a minute.

Thereupon, and further to maintain the issues on its part joined,
the defendant offered ARTHUR M. LOVEDAY who testified that he was
a switchman in the employ of the defendant company at the time
the accident happened; that a south-bound 14th Street car came
down to the junction, 15th and G Streets, stopped, and while it
was standing there a west bound Avenue car came up, and witness
pulled the switch to let the Avenue car through, when he noticed
the 14th Street car still at a standstill; that witness afterwards saw
that the 14th Street car had stopped at the regular place for stop-
ping. After the 14th Street train had come to a full stop the west-
bound Georgetown train came up. That witness walked down and

looked between the rear end of the motor and the front end of the trailer to see what was the trouble and saw the conductor holding up
an elderly man; that he notified Officer Putnam, the cross-
27 ing policeman, of the accident. That his duties are to switch
all cars that the switch has to be pulled for and to make a
report of all accidents that happen. On cross-examination the wit-
ness testified that when he looked between the cars the old gentle-
man was standing right directly opposite the step on the rear of the
motor car—exactly opposite—with the conductor assisting him and
that he was about a step from the car. The 14th Street car had
stopped before witness pulled the switch for the west-bound car; the
14th Street car got there first before the Avenue car, which was a
Georgetown, and not an F and G car.

Thereupon, and further to maintain the issues on its part joined,
the defendant offered ALFRED WILKINSON who testified that he was
employed in the claim agency department of the Capital Traction
Company; that he took the statement in evidence from the plaintiff
at the Emergency Hospital; that the plaintiff was present and very
sociable and said nothing about his suffering intensely; was there
about half an hour when he signed the statement and his daughter
who was there witnessed it. That the plaintiff made no objection
to telling witness what he knew about the case nor did the plaintiff's
daughter say her father was suffering and that witness had better
call again. That the plaintiff signed the statement in his pres-
ence and in the presence of the plaintiff's daughter who witnessed
it there. That the plaintiff told him he had been a soldier and in
looking at his signature when he signed it he laughed and said: "I
did not keep a straight line. It is uphill." The witness remarked:
"Well, I guess you have charged up hill many a time when
28 you were a soldier." That just before the witness left a
gentleman came in who the plaintiff introduced as his son-
in-law. That the plaintiff's daughter had been reading to him when
the witness first saw him.

Thereupon, and further to maintain the issues on its part joined,
the defendant offered ETHAN ALLEN HEFLIN, who testified that he
was motorman on the 14th Street car on which Mr. Hutchinson was
hurt; that his train consisted of two closed cars; that the East side
of the car platforms was closed by an iron gate; that the train had
just a very few passengers because the train which had left next
ahead of his was late and took up the passengers; that witness stopped
his car at 15th and New York Avenue and waited there until the
car ahead of him was just about leaving the transfer junction and
then followed him into the junction; then stopped at 15th and G
Streets at the usual stopping place, without any jerk; there wasn't
any necessity of being in a hurry as the train was on time; this was
the first stop made after leaving New York Avenue and 15th Street.
At 15th and G there is a stop plate and witness's car was brought to
a full stop there; that after waiting for bells and not getting any,
witness looked back and saw the conductor was holding up an old

man; didn't know anything had happened before that; from the time that witness stopped there he did not get bells to go ahead until after the conductor came out of the drug store; before the car had come to a stop had not looked through the door into the body of the car; didn't look back until after he didn't get bell; that when

he looked back through the car the plaintiff was standing
29 near the rear step of the motor car.

On cross-examination witness testified that when he first saw the old gentleman he was standing about two feet from the car immediately in line with the step of the motor car. That the power is off the car as it passes over the cut-outs, but a motorman can give the car speed enough to go over there without getting any power; "some times if you have not given yourself speed enough to go over these places, of course you have to build up in between; sometimes you put on your power again after you have passed these places where you do not get any power, if you want it to go down to the stop plate, and maybe you don't give yourself quite speed enough to go down to the stop plate, or maybe you have to pull it on a point or such a matter to get down to the stop-plate." The car was stopped with its fender right over the stop-plate that night. The brake is always released before a stop is made so that the car comes to an easy stop. The cars are never started with the brakes on. On the night of the accident the brakes had already been released. "I had to release them; yes. I put the brake on, you know, when I got off on the ground. Of course I had to release the brake then, before I could start. It would not do for to leave the brakes not on when when you got off the car. We stop the car with the use of the brakes and wind it up to put it on. We release the brake before we stop.

"Q. What stopped your car then? A. Well, the brake is put on tight enough to stop the car, but you have to release the brake to keep it from a jerk. If you put on your brake hard and
30 leave it on there, it will stop with a 'chug,' like that; and we always release it. That is the way I was learned when I was broke in.

Q. You put on your brake to stop your car? A. Yes sir.

Q. Then you take off your brake just before the car stops? A. No; we don't take it clear off you know. We just ease up on it, enough for to keep it from 'chugging,' you see.

Q. If you did release your brake suddenly that would cause this 'chug' or jerk; would it not? A. Oh, no; if you released it, it would not do it. It is putting the brake on and leaving it on. If you leave the brake on when it runs up like that, of course it has got to 'chug'—right up against the wheel, tight, you know, against that dog."

Thereupon, the defendant to further maintain the issues on its part joined, offered AMOS H. WHITACRE who testified that he was the conductor of the car on which Mr. Hutchinson was a passenger; that he was thirty-three years of age and had been a conductor on the Capital Traction Company's line for nine years—pretty nearly

ten years now; that the train was made up of two closed cars—motor and trailer; that there are gates on the left hand side of the car platform which are always fastened; that there were five passengers on the train including the gentleman that fell off; that as well

31 as witness remembers two ladies and two gentlemen were in the front car—the gentleman who fell off was in the front car—and a colored woman in the rear car. That the two ladies in the front car left it while witness was with the plaintiff giving him what assistance he could. That he had been unable to find either of these ladies; the gentleman who fell was near the front of the motor car on the left hand side. “Well, I was standing on the front of the trailer at this time and this old gentleman got up and walked out of the car. He stepped down on the step and fell. The car was moving very slow at the time. Of course I went to his assistance as soon as I could, and wanted to take him over to the drug store and send him to the hospital.” That the witness and Officer Putnam formed a seat with their hands and took the plaintiff over to Thompson’s Drug Store.

The accident happened about eight-thirty in the evening—it was on Sunday. The car stopped before coming around the curve at 15th Street and New York Avenue. We always stop there before coming around. It did not stop again before he fell after leaving the curve; it did not stop any more until it stopped at the transfer junction. The car did not go more than twelve inches after he fell; only a very short distance. He was laying right opposite the step where he got off when I helped him up. The colored woman was on the front of the trailer standing close to me. Witness was on the front platform of the trailer; did not give two bells for the car to start before he fell; the car had not come to a stop after it left 15th Street and New York Avenue before he fell; was not on the motor car at the time. That when the plaintiff got out of the motor

32 car the witness was on the front of the trailer and did not give two bells for the car to stop before the plaintiff fell.

Q. When was the last time that you were in the motor car before the accident as nearly as you can recollect? A. I don’t remember about that. The reason I know I was on the outside of the car was because we have to be on the outside at these junctions before starting our car. We are not allowed to stop them on the inside at a transfer junction.

On cross-examination the witness further testified that he was on the front platform of the trailer when the old gentleman commenced to get up from his seat and saw him go down the aisle of the car; that there was nothing unusual about him. The colored woman was standing by the side of witness.

Q. How were you facing, south or west or east or how? A. I judge I was facing the front of the car.

Q. Do you not know as to that? A. Well, I cannot say for sure, but I presume I was facing the front of the motor car.

Q. You saw the old gentleman get up from his seat? A. I saw the old man get up from his seat but I did not have my eyes glued right on him all the time.

Q. How soon after he had arisen from his seat did you take your eyes off him? A. I don't remember. I didn't pay any more attention to him than to any other passenger getting off the car.

33 Q. Did you have your eyes on him as he passed through the doorway? A. I did; when he came out on the platform.

Q. And you were looking directly South? A. I was looking South, yes, sir.

Q. As he started to go West, he wanted to alight from the car, did he not? A. He did.

Q. He had obtained a transfer from you had he not? A. He got a transfer.

Q. You knew that? A. I knew that.

Q. You knew his purpose? A. I did.

Q. You saw the Washington and Georgetown car there did you not? A. I did not. I did not notice it.

Q. You did not notice it? A. No sir.

Q. You knew this car was moving—the car you were on? A. Yes sir; I knew the car was moving.

Q. Why did you not tell the old gentleman not to get off that moving car? A. Because I did not know he was going to get off.

Q. Did you not have your eyes on him? A. I did.

34 Q. Could you not see him when he got from the platform down on the step? A. I did.

Q. Why did you not say a word to him, not to get off that moving car? A. Because I did not know he was going to get off. How did I know he was going to get off? How did I know he was not going to wait until the car stopped?

Q. What did you think he was going to do? A. I thought he was going to wait until the car stopped, and get off.

Q. The car was going very slowly? A. The car was going very slowly.

Q. And it would have been a very easy matter for you to have told him not to get off until it stopped? A. Yes, I guess it would. It would also be very easy for him to wait until it stopped. I didn't know he was going to get off."

Witness has not his rule book with him and does not recall Rule 130 by number, but when it is read to him says that it reads like this:

"130. When not otherwise engaged on the Company's business conductors must be on the platform and on the lookout for passengers who wish to take or leave the car. The car must never be started until all passengers are on or off, and conductors must try to prevent them from boarding or leaving the car while it is in motion."

35 Q. Why did you not prevent this old gentleman from leaving a moving car? A. Why did I not prevent him?

Q. Yes.

The WITNESS: You mean why did I let him step off the car?

Q. Yes. A. Because I didn't know he was going to step off. I told you that a while ago.

Q. You saw him step down on the step? A. I did.

Q. You saw him grasp the hand rail there? A. He was standing on the step holding to the rail.

Q. You saw him as he stepped down on the step and grasped that hand rail? A. I did.

Q. And you did not warn him that the car was moving because you did not know he was going to step off. A. I did not know but what he knew the car was moving. How did I know.

Q. You supposed he was going to wait on this step until that car had actually come to a stop? A. I did, because the car had not moved further than that (indicating twelve inches) he was laying right opposite the back of the car where he fell—right opposite the step.

Q. What threw Mr. Hutchinson from the car? A. He stepped off before the car stopped and it threw him.

Q. Did you see this hold broken from the hand rail? A. I did not.

Q. Were you not watching him then? A. Do you mean when he had hold of the hand rail did I see it break loose? I presume I did.

Q. Do you not know you did? A. No sir; I don't know it—that I actually saw it. I saw him when he fell. I was looking at him. Sure I saw him when he fell.

Q. And when you saw this old gentleman get up from his seat and come down and step from that platform down on the step you did not suppose he was going to step off? A. I did not. If I had I would have holloaed at him, or tried to have caught hold of him.

Whereupon, the plaintiff to further maintain the issues on his part joined, offered in rebuttal HARRIET A. ATEN, and EVERETT M. ATEN, who all testified as to the great suffering that plaintiff was in at the time the railway company's claim agent had taken his statement. That the witness Harriet T. Aten remembers something of the plaintiff going into his former soldier experiences when the statement was signed. That she signed it but did not know the nature of it at all.

The testimony on both sides being thereupon announced as closed, counsel for the respective parties presented to the Court their prayers for instructions.

(After argument.) The COURT: Gentlemen, I will reject the first, second, third and fourth prayers of the plaintiff, and will grant the fifth and sixth, with the statement, however, which I will make to the jury, that in case they find for the plaintiff, they must consider the age of the plaintiff in connection with the other things. The first two prayers of the defendant are conceded, and the third is granted.

Mr. MATHER: To the granting of the defendant's third prayer I wish to note an exception, if it please the Court; and to the refusal of the Court to grant the first, second, third and fourth of the plaintiff's prayers. Then I would like to be apprised by the Court as to whether I am prevented in this case from arguing to the jury that

the measure of care incumbent upon the defendant was the highest degree of care.

The COURT: No I propose to instruct the jury as to that myself, but I propose to do it in connection with the facts of this case.

Mr. MATHER: Certainly.

The COURT: That the highest degree of care in this case was the care that required them to stop until he had gotten off. There is nothing in this case about care, you know, Mr. Mather, that I can see except the single question: Did they exercise the highest degree of care in seeing that that car did not start after it had once stopped until the passengers got off.

Mr. MATHER: Then your Honor would limit the argument of this case, or restrict the argument in this case to that one theory,
38 that the plaintiff cannot recover in this case unless the jury find that the car stopped and started again and threw this plaintiff?

The COURT: Yes, there is no other evidence in the case than that. The reason I say that in answer to that question is that I know of no evidence in the case to support any other theory. Unfortunately the Court cannot on that point agree with you in this case. There is no contention about the law but as to the application of it. Whilst I may agree with the law I cannot agree with it in this case because the testimony in this case all goes to one of two theories as I tried to say before:—Either that the plaintiff in this case was waiting for the car to stop or that it did stop and started before he was entirely off; or on the other side that he got off the car while it was moving. If he got off while the car was moving then you cannot recover in this case if his injuries resulted in his getting off.

Mr. MATHER: Whether he knew the car had stopped or not?

The COURT: Yes. That does not make the slightest difference.

(The prayers for instructions on behalf of the respective parties, as amended, granted, conceded, and rejected, are in the words and figures following, to wit:)

Plaintiff's Prayers.

I. "You are instructed that the defendant street railway
39 company was bound to exercise the highest degree of care and skill practicable under all the circumstances in this case in caring for plaintiff's safety while a passenger on one of its cars; and if you believe that the plaintiff was injured whilst such passenger, because of the failure on the part of the defendant company to exercise such care and skill, then the plaintiff is entitled to recover in this action."

(Rejected. Exception.)

II. You are instructed that the defendant street railway company is required to do all that human care, vigilance and foresight can reasonably do, consistent with its mode of conveyance and the practicable prosecution of its business to prevent accident to its passengers when alighting from its cars; if, therefore, you find in this case that plaintiff

was a passenger on one of defendant company's cars, and was about to alight therefrom at the regular transfer station at 15th and G Streets, Northwest, and further find from all the facts and circumstances in the case that said defendant company, through its motor-man or conductor, or both, knew, or could have known of said plaintiff's intention to alight at this point, and yet failed to exercise the care and vigilance that the occasion demanded to see that said plaintiff alighted in safety, your verdict should be for the plaintiff.

(Rejected. Exception.)

40 III. Even though you should find that the jerk which precipitated plaintiff to the street was caused by his foot coming in contact with the surface of the street in his endeavor to alight from the car, which was in motion at the time, and not by reason of any sudden jerk or movement of the car; yet, if you further find from all the facts and circumstances in the case that the plaintiff *reasonably* supposed the car to be at rest, and perfectly safe for him to alight from, and the conductor knowing that he was about to alight from this moving car, gave the plaintiff no warning that the car was still moving, or that it was unsafe for plaintiff to attempt to alight therefrom and that by reason of this negligence plaintiff was injured, your verdict should be for the plaintiff.

(Rejected. Exception.)

IV. You are instructed that as plaintiff was injured when a passenger of said defendant street railway company, it is necessary for said company, in order to escape liability for injuring him, to show you from all the facts and circumstances in the case, and by a preponderance of the evidence, that not only was plaintiff himself negligent, but further that his said negligence directly and efficiently contributed to the production of the injury.

(Rejected. Exception.)

41 V. You are instructed that if you find from the evidence that the plaintiff, soon after he was hurt, made statements in relation thereto at variance with his testimony given in this case, and you further find that at the time of making the former statements he was suffering shock and pain, you are to look at the difference in the statements from the point of view of his condition when making each, and to consider what effect the shock and pain from which he was suffering, if he was so suffering when he made the former statements, might have had on his ability to correctly ascribe the true cause of the accident.

(Granted. Exception.)

The Sixth numbered prayer (as to the measure of damages) was conceded as modified by the Court.

Defendant's Prayers.

I. The jury are instructed that in the case at bar no presumption of negligence arises from the mere happening of the accident in question.

(Conceded.)

II. The jury are instructed that the burden is upon the plaintiff to prove to the jury by a preponderance of the evidence that the acci-

dent in question was due to the negligence of the defendant, and that said negligence was the proximate cause of the plaintiff's injury.

(Conceded.)

42 III. The jury are instructed, as a matter of law, that in order for the plaintiff to recover in this action against the defendant, he must prove by a preponderance of the evidence that on the occasion in question the defendant's car came to a stop, and that while the plaintiff was endeavoring to alight therefrom it started forward and threw him.

(Granted. Exception.)

Charge to the Jury.

The COURT (Mr. Chief Justice CLABAUGH): Now, gentlemen, the facts in this case, to my mind, are very simple; and the law is just as simple. The plaintiff charges and has offered evidence tending to show that he was a passenger on the car in question, and that it stopped at the place of transfer on 15th Street near G Street; that he waited until it had stopped, and then arose from his seat in the car, passed the conductor in the car, walked out on the platform, and down on the step, and as he had his foot in the air, to place it upon the ground, the car suddenly started and threw him, whereby he was injured. That is the plaintiff's case, as he contends.

The law puts upon the plaintiff the burden of proving those facts by the fair weight of the testimony. That is called the preponderance of the proof, which means the fair weight of the proof, as I have explained to you so many times.

Now, if you find those facts from the testimony in this case, the plaintiff is entitled to recover in this case. You have heard
43 in the discussion here (with which, however, you have no concern—the discussion before the Court) a great deal said about the highest degree of care that must be exercised by a railroad company in respect to its passengers. Now, it is true that they must use the highest degree of care for the safety of their passengers. Every railroad company has that duty laid upon it. But that rule of law must be applied to the facts in each case. The only question in this case is: Did the plaintiff get off that car whilst it was standing still, and, whilst he was in the act of getting off, was the car started and was he thereby injured?

Those conditions require the highest degree of care, to wit, that the defendant company must use the highest degree of care not to start its train until a passenger has alighted. In that respect in this case the highest degree of care must be exercised by the defendant in this case; and therefore it follows, of course, that if the defendant did not use that care but started the train (having stopped it, and the plaintiff being in the act of getting off) before he did get off, and threw him, then they were not using the degree of care which the law says they must use, and he would be entitled to recover. That is the plaintiff's side of this case.

Now, on the other hand, if the defendant company in this case stopped its car, but before it did stop the plaintiff in this case got off

and by reason of his getting off whilst the car was in motion he was injured, then he is not entitled to recover in this case, and
44 your verdict must be for the defendant.

It is a perfectly plain, simple question of fact, and of law. There is no difficulty about understanding either of these things; so that there ought not to be any trouble for you to understand what the law is; and I am sure there will not be, any more than there ought to be any difficulty in finding the facts in this case.

That being so, it is essential, by reason of the misunderstanding on the part of counsel for the plaintiff of what the Court intended to say, and as it understands it, did say, that I should say this: There is no evidence in this case, and there is no allegation, as I understand it, in this case, which would permit you to say that the conductor, under the law, was compelled to stop the plaintiff in this case when he went out on the platform, and even stepped down on that step. There is no law which would compel the Company, in the use of the highest degree of care, to know what the passenger was going to do—whether he was going to wait, when the car was going so slowly that it only went, as some say, twelve inches after the plaintiff was thrown, or whether he was going to get off. There is no law which would compel the conductor to know that that plaintiff was going to get off when the car was so near a stop. Therefore you have nothing to do with that phase of the case, because, as I have already said, that is not the theory upon which the case has been tried. It has been tried upon the theory that the car had stopped, and, whilst the plaintiff was in the act of getting off that car, it started. That
45 is the theory upon which either the plaintiff is entitled to recover or the defendant is entitled to your verdict.

I have said that simply because there was some misunderstanding on the part of counsel for the plaintiff of what the Court had intended to say. I permitted him to discuss it merely because I thought perhaps there might be some effort to attack the credibility of the conductor in this case, because he did not stop the plaintiff before he got off. That was the only theory upon which I permitted counsel to discuss it at all.

I want to advise you here that you are trying the facts in this case, gentlemen, and not in any other case; and it is not proper for counsel in this case or in any other case to appeal to juries, or jurors as to what conclusion they may have arrived at in the trial of other cases. In other words, it is not competent, in my judgment, for counsel to say to a jury: "From your service in other cases you must recognize the fact that the Company's employés sustain each other in every case they testify in."

In the first place, there is no law for such a statement. In the second place, there is no fact in such a statement, and you must not be governed by it. An employé is entitled to be believed or disbelieved just as you would believe or disbelieve any other witness in a case—just as you would a plaintiff in a case. I say this to put you upon your caution that statements of that character, while made by counsel without meaning to do anything in violation of the rights and duties of counsel, are not to be regarded by you. You cannot

46 judge one employé by a statement that in other cases you may have found that one employé sustained other employés in the same case.

You are to be governed in this case by the law and facts of this case. You are to have no consideration of sympathy in this case. It is true this plaintiff has been seriously injured; but that does not concern you in any degree whatever unless you first find that his injury was caused by the fault, the negligence, of the defendant company. When you have found that his injury was caused by the fault or negligence of the defendant company, then you must proceed farther and ascertain what those injuries are—how much he has suffered, and so on.

I have been asked to read to you this prayer:

“You are instructed that if you find from the evidence that the plaintiff, soon after he was hurt, made statements in relation thereto at variance with his testimony given in this case, and you further find that at the time of making the former statements he was suffering shock and pain, you are to look at the difference in the statements from the point of view of his condition when making each, and to consider what effect the shock and pain from which he was suffering, if he was so suffering when he made the former statements, might have had on his ability to correctly ascribe the true cause of the accident.”

Which simply means with respect to the statement in question here, the statement which he gave to the railroad company's representative. If you find (as, of course, you must) that there is a wide difference between the statement made by the plaintiff on the
47 stand and the one alleged to have been made by him when he was at the hospital, in considering the difference in those statements you have the right to consider the condition under which each was made, and to conclude whether or not the condition of bodily suffering and pain, if it existed at the time, had any influence upon the statement be made at that time, as explaining why there should be a difference between the statement made at the hospital and the statements made upon the stand.

Those are things that you have a right to consider, and it is for you to determine whether they are sufficient to explain away the difference in the statements made at the two different times. That is what that means, as I understand it.

Nor are you to infer that there was any negligence on the part of the defendant company by reason of the accident in this case. The negligence has to be proved, as any other negligence charged.

You are instructed that the burden is upon the plaintiff to prove to the jury by a preponderance of the evidence that the accident in question was due to the negligence of the defendant, and that said negligence was the proximate cause of the plaintiff's injury.

You are instructed, as matter of law, that in order for the plaintiff to recover in this action against the defendant, he must prove by a preponderance of the evidence that on the occasion in question the defendant's car came to a stop, and that while the plaintiff was en-

deavoring to alight therefrom it started forward and threw him.

48 Now, gentlemen, I have tried to say to you what I have said in plain, distinct language, without the use of any legal terms or anything else except just such language as we talk when we meet each other. So you understand exactly what the law in this case is, and you have heard the evidence.

Therefore, if you find from the evidence in this case that the plaintiff has proved by the fair weight of the testimony that his accident was caused by the defendant company, then you must go one step farther. Of course he would then be entitled to recover, and you must go one step farther and say how much he is entitled to recover.

The Court further instructed the jury as to the measure of damages, if they should find in favor of the plaintiff.

(After the jury had been charged and before retiring:)

Mr. MATHER: I wish to except to so much of your Honor's charge as restricts the plaintiff to the one theory of this case, and eliminates as a factor in the case whatever of negligence the jury may have found on the part of the defendant in not stopping, or in not saying anything to the plaintiff as he was about to alight from this moving car. I also wish to except to so much of your Honor's charge as relates to the burden of proof. There was no mention made of the burden shifting to the defendant to show contributory negligence on the part of the plaintiff. Then I also wish to quote an exception to so much of your Honor's charge as covers the defendant's third prayer.

49 And thereupon, after each and all of the said exceptions were duly taken as aforesaid and entered upon the Minutes of the Court, before verdict given and before the jury had retired to consider on the same, counsel for the plaintiff then and there prayed the Court to sign and seal this Bill of Exceptions, and at the request of said counsel for the plaintiff the same is accordingly signed and made a part of the Record in this case *nunc pro tunc* this 24th day of June, A. D., 1910.

HARRY M. CLABAUGH,
Chief Justice

Directions to Clerk for Preparation of Transcript of Record.

Filed June 27, 1910.

* * * * *

The Clerk of said Court will prepare Record on appeal as follows: Declaration as amended M'ch 15/10; plea; joinder; memo. of verdict; judgment; appeal; memo. of bond; Bill of Exceptions.

LEONARD J. MATHER,
Attorney for Pl'ff.

50

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 49, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 51179 at Law, wherein William H. Hutchinson is Plaintiff and Capital Traction Company, a corporation, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 25th day of July, 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2196. William H. Hutchinson, appellant, vs. Capital Traction Company, a corporation. Court of Appeals District of Columbia. Filed Jul- 26, 1910. Henry W. Hodges, clerk.

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IN THE
Court of Appeals, District of Columbia.

OCTOBER TERM, 1910.

No. 2196.

WILLIAM H. HUTCHINSON, APPELLANT,

vs.

CAPITAL TRACTION COMPANY, A CORPORATION.

BRIEF FOR APPELLANT.

Statement of the Case.

This is an action on the case brought by William H. Hutchinson, nearly eighty-four years of age, who was a passenger on one of the Capital Traction Company's cars, to recover damages for personal injuries inflicted upon him on March 29, 1908.

The declaration counts upon the relationship of carrier and passenger, averring the duty of the carrier not only to carry plaintiff safely, but as well "to safely allow him to get off said car at his alighting destination," and then re-

lies on the presumption of negligence arising from the breach of this duty.

The proof showed that appellant was hurt while such passenger on the forward or motor car of one of appellee's Fourteenth Street south-bound trains, consisting of two closed cars, when seeking to alight at its transfer station at Fifteenth and G streets northwest . It was at night—about 8:30 o'clock (R., 17). Appellant, an old man—for he was in his eighty-fourth year (R., 5)—looked very feeble (R., 13). He boarded the train at Fourteenth and Monroe streets, seated himself in the east forward corner of the motor car, and asked for and received a transfer below Thomas Circle for the Fifteenth and G Street transfer station, intending to alight at this point and take a Georgetown car to go to his home on Seventeenth street (R., 5). There were only five passengers on the train, including plaintiff, four in the front car and one in the rear car (R., 17). In attempting to alight at this transfer station appellant was thrown to the street and very badly injured. He declared the car had stopped as dead as a rock (R., 7), and would have taken a double oath that there was not any motion in it (R., 8); the evidence showed it to have been moving, but very slowly, as it did not go more than a foot, or a foot and a half, south of where appellant was thrown (R., 17, 12, 13). The conductor was standing on the front platform of the trailer car (R., 17), and appellant sought to alight from the west side of the rear platform of the motor car (R., 5, 8, 12, 18). The conductor knew appellant was going to alight at this point (R., 18), for it was a regular transfer station (R., 17), and he had given him a transfer for this purpose (R., 5, 18); watched him leaving his seat (R., 17); saw him go down the aisle of the car (R., 17), and had his eyes on him as he passed through the doorway; came out on the platform, and stepped from the platform down on the step (R., 18, 19), grasping the hand-rail as he did so (R., 19), from which his hold was broken loose as he was thrown, from stepping off before the car stopped (R., 19). The conductor knew that

the car was moving very slowly (R., 17, 18) and very gently (R., 13), without irregularity or jerk (R., 12, 15). He knew that the company's rules for his guidance required him to prevent people from leaving the car whilst it was in motion (R., 18), for he had been a conductor in the employ of this company for pretty nearly ten years and was familiar with its rules (R., 16, 17, 18). Yet, unoccupied as he was in any other way, he never thought it worth while to utter any warning, because he did not know but that the old gentleman *knew* the car was moving, *and did not suppose he was going to step off* (R., 18, 19), although appellant was old and looked feeble; it was in the night time (R., 17); there was no perceptible motion to the car (R., 12, 13, 15), and appellant, slowly, and without haste (R., 5, 7), and with full knowledge of the conductor—for it was right before his eyes—had gone through every motion save that of the last *fateful* step, evidencing an intention to alight, and preparatory to actually stepping off the car (R., 17, 18, 19). The conductor acknowledged that had he *only known* appellant was going to step off he would have holloaed at him or tried to have caught hold of him (R., 19).

This, in substance, is the whole of the testimony offered below.

The case being allowed to go to the jury *only* on the *single issue* as to whether the appellee railway company improperly started its car after stopping it ~~at~~ this transfer station, appellant has appealed and asks a reversal of ~~this~~ erroneous ruling, for the jury, of course, under the court's instructions, could not do otherwise than return a verdict for the defendant.

Assignments of Error.

1st. That the trial court erred in refusing to grant prayer numbered I offered on behalf of plaintiff below, appellant here.

2d. That the trial court erred in refusing to grant prayer numbered II offered on behalf of appellant.

3d. That the trial court erred in refusing to grant prayer numbered III offered on behalf of appellant.

4th. That the trial court erred in refusing to grant prayer numbered IV offered on behalf of appellant.

5th. That the trial court erred in granting prayer numbered III offered by defendant below, appellee here.

6th. That the trial court erred in refusing to instruct the jury (even on the only theory that the case was allowed to be considered of by them) that if the defense was contributory negligence, it was incumbent upon the appellee to show, by a preponderance of the proof, that the accident was directly occasioned by the contributory negligence of the appellant.

7th. That the trial court erred in holding as a matter of law that if appellant got off a moving car and was thereby injured he was not entitled to recover.

8th. That the trial court erred in eliminating from the consideration of the jury any other theory of the happening of the accident save the one that the car had stopped and prematurely started again, thereby throwing appellant as he was about to alight.

9th. That the trial court erred in deciding as matter of law that appellee's conductor was not guilty of negligence is failing to warn appellant against alighting from a moving car, and in refusing to allow the question to be submitted to the jury.

10th. That the trial court erred in restricting the case to the one theory that the car had stopped, and thereafter had

been improperly started, thus throwing appellant to the ground as he was about to alight, as it thereby singled out, and gave undue prominence to that portion of the testimony *only*.

11th. That the trial court erred in assuming that appellant's theory of the case was that the car had stopped and started again, when the evidence in the case presented other questions as to appellee's negligence.

12th. That the trial court erred in charging the jury: "There is no evidence in this case, and there is no allegation, as I understand it, in this case, which would permit you to say that the conductor, under the law, was compelled to stop the plaintiff in this case when he went out on the platform, and even stepped down on that step. There is no law which would compel the company, in the use of the highest degree of care, to know what the passenger was going to do—whether he was going to wait, when the car was going so slowly that it only went, as some say, twelve inches after the plaintiff was thrown, or whether he was going to get off. There is no law which would compel the conductor to know that that plaintiff was going to get off when the car was so near a stop."

ARGUMENT.

I.

*Appellee's Negligence was the Proximate Cause of the
Injury to Appellant.*

The first question embraced generally by the 1st, 2d, 3d, 5th, 8th, 9th, 10th, 11th, and 12th Assignments of Error is as to the negligence of the appellee railway company, for if there be no facts from which the jury might properly and reasonably have inferred negligence, or no negligence proven, appellant has no claim to the consideration of this court, no matter how untoward and unfortunate the happenings.

What, then, is the negligence claimed; what the negligence to be inferred or proven?

It will be noticed at the outset that the Declaration avers no negligence, but counts on the relationship of carrier and passenger, and relies on the presumption of duty thereby raised of carrying and allowing its passengers to alight in safety at their destination (R., 1, 2).

Appellant's evidence out of his own mouth, as to the happening of the accident, is as follows:

"I did not make any effort to rise until I was positively sure that the car had stopped." * * * "I passed on to the end of the car, on to the platform." * * * "I moved forward two steps, took hold firmly of the stanchion with my left hand and stepped off with my right foot directly on to the step below. I had my foot lifted, my left foot in mid-air, and quicker than a flash I was lying right under the car, right under the woodwork of the car, alongside of the moving wheel" (R., 5); and again, on cross-examination: "I will take a double oath when I got my left foot in mid-air, to step down on

the street, there was not any motion until I was pulled right over just like a flash of lightning. Just as I was stepping down and was thrown under the car, I heard the bell just as distinctly as if I was on the front platform" (R., 8).

Thus it appears that appellant, neither by averment nor proof, specifies or limits his right of recovery to any particular ground of negligence, or any specially selected theory of the case, although the learned trial court held that the case should be restricted to the one theory, viz., that the car had stopped and thereafter was improperly started (R., 20, 21, 22, 23), which was not only confusing, but, necessarily, misled the jury, for not only was there no evidence in the case-in-chief to support such a theory, but as well the "proof" in the case was susceptible of no such selection or division.

Of course if a Declaration alleges specific negligence, a plaintiff can recover only on proof of that negligence. He cannot recover on proof of any other negligence. He has stated his claim, and must prove it as laid. But where there is no specific claim alleged in the Declaration, the proof cannot be segregated and picked out and a part endorsed, while the other part is thrust aside and discarded. The evidence must be considered as an entirety, and the question of negligence, under proper instructions from the court, should have been left to the determination of the jury under its own particular prerogative of weighing and determining all questions of fact.

As was said by this court in *Sullivan vs. Railway*, 34 App. D. C., 358, 366, 368:

"In the instructions requested by plaintiff, and refused by the court, it was sought to establish negligence from a single circumstance in the case. It has been held by this court repeatedly that it is ~~in~~ error for the court to select from the evidence any particular part thereof for the matter of a special comment and charge to the jury."

And again:

"All the competent testimony adduced in the trial is for the consideration of the jury."

Likewise, in *Kehan vs. Ry.*, 28 App. D. C., 108, where the question was as to the railway company's negligence in throwing an alighting passenger, and after reviewing the utterances of the Supreme Court of the United States laying down the rule "that the happening of an injurious accident is, in passenger cases, *prima facie* evidence of negligence on the part of the carrier, and that (the passenger being himself in the exercise of due care) the burden then rests upon the carrier to show that its *whole* duty was performed, *and that the injury was unavoidable by human foresight*," it was held error by this court for the trial court to restrict plaintiff's right to recover upon a singled-out theory of the case, for, as was said:

"When the plaintiff proves the occurrence of the accident, the defendant must answer that case *from all the circumstances of exculpation disclosed by the evidence*, and *the jury must determine* whether the relation of cause and effect exists between the accident and the exonerating circumstances."

So here the evidence makes up the case. It may tend to show negligence in some half a dozen different ways. It is not compulsory for the jury to find one way or the other on all or none of these elements of negligence. They may find on one only, and discard the rest as not proven; or they may conclude some or all have been sufficiently made out. Evidence tending to show negligence in any form or degree was relevant. Proof of any negligence was admissible. Singly or collectively, as the case may be, these elements constitute and establish the *wrong* done. It is from the proof—*all of the proof*—that the "theory" of a case is to be evolved, when it has not been averred, and it is from the proof that the negligence, if any, is to be deduced.

How different in this case, for the III numbered prayer granted appellee and covered by the 5th Assignment of Error, is as narrow, restricted, and erroneous as was prayer numbered I in the Kehan case, *supra*; is as objectionable for compressing all its elements into one selected and particular theory, and is, moreover, utterly opposed to the principles of law laid down therein governing the relationship of carrier and passenger and their respective duties.

Not alone, however, does the Assignment of Error cover the granting of this III numbered prayer offered by appellee, for all through the colloquy between court and counsel, as well as in its charge to the jury, there can be traced the same repetition of erroneous ruling.

For example:

"The COURT: That the highest degree of care in this case was the care that required them to stop until he had gotten off. There is nothing in this case about care, you know, Mr. Mather, that I can see, except the single question: Did they exercise the highest degree of care in seeing that that car did not start after it had once stopped until the passengers got off."

"Mr. MATHER: Then your honor would limit the argument of this case, or restrict the argument in this case to that one theory, that the plaintiff cannot recover in this case unless the jury find that the car stopped and started again, and threw this plaintiff?"

"The COURT: Yes; there is no other evidence in the case than that" (R., 20).

"CHARGE: The only question in this case is: Did the plaintiff get off that car whilst it was standing still, and, whilst he was in the act of getting off, was the car started and was he thereby injured?" (R., 22).

And again:

"There is no evidence in this case, and there is no allegation, as I understand it, in this case, which would permit you to say that the conductor, under the law, was compelled to stop the plaintiff in this case when he went out on the platform, and even

stepped down on that step. * * * Therefore you have nothing to do with that phase of the case, because, as I have already said, that is not the theory upon which the case has been tried. It has been tried upon the theory that the car had stopped, and, whilst the plaintiff was in the act of getting off that car, it started. That is the theory upon which either the plaintiff is entitled to recover or the defendant is entitled to your verdict" (R., 23).

Fraught with such significance, these words, authoritatively coming, as they do, from the lips of the court, fall with irresistible force and conclusiveness upon the ears of the listening jurors, thus determining adversely to appellants lawful rights.

Having ascertained that it is from the proof in the case that the jury, under proper instructions from the court, should have been allowed to infer or find *negligence*, we are, at the very threshold of our inquiry, constrained first to consider what was appellee's duty to appellant; what was its legal responsibility; what its measure of care: that applying, and measuring, and fitting this to the facts in the case, this court can say whether or not there was any breach of its duty; any evidence of *negligence* sufficient to be submitted to the jury.

What, then, was appellee's measure of care? What its duty?

The proof showed the relation of the parties herein to have been that of contract passenger and carrier.

That being so, it will scarcely be gainsaid that the highest degree of care compatible with the conditions prevailing at the time, and commensurate therewith, in the practical carrying on of its duties as such public carrier, was due from appellee to appellant; for although such public carriers are not insurers, they are, nevertheless, held to a very strict accountability for the care and preservation of those entrusting themselves to their guidance and control.

This principle is axiomatic.

Early, was it said by Chief Justice Shaw, in the leading case of *Farwell vs. Railway*, 4 Met., 49:

“Passenger carriers are held to the strictest responsibility for care, vigilance, and skill, on the part of themselves and all persons employed by them, and they are paid accordingly.”

Says Nellis, in his *Street Railroad Accident Law*, p. 109:

“A common carrier of passengers is required to use the highest degree of care, vigilance and foresight consistent with the character and mode of conveyance adopted, and reasonable and practicable in the operation of its road, to safely carry and deliver its passengers.”

Hutchinson, in his *Work on Carriers* (sec. 893, p. 994), puts it thus:

“The real meaning embraced by the different definitions ‘is that the care and circumspection to be required is the utmost which can be exercised under all the circumstances, short of a warranty of the safety of the passengers; and the rule cannot, perhaps, be better or more forcibly expressed than in the words of Sir James Mansfield, in the case of *Christie vs. Griggs*, 2 Camp. (Eng.), 79, that the duty of the carrier is to provide for the safety of the passengers ‘as far as human care and foresight will go.’ ”

In Booth, on *Street Railway Law*, sec. 328, we find the same rule as follows:

“A common carrier of passengers by street car is required to exercise the highest degree of skill and care which may reasonably be expected of intelligent and prudent persons engaged in that business, in view of the instrumentalities employed, and the dangers naturally to be apprehended. The carrier is not an insurer of the safety of its passengers, and is not bound absolutely and at all events, to carry

them safely or without injury. They take the risks of their own carelessness, and of dangers which could not be averted by the carrier by the exercise of the degree of care which the law demands."

This principle of law has been exemplified, it may be said, by a long line of decisions by the Supreme Court of the United States, from the *Stokes vs. Saltonstall* case in 13 Pet., 181, down to the *Calhoun* case in 213 U. S., 1.

This court, likewise, under the varying phases in which the application of the above rule has been questioned, has always reiterated and affirmed it.

Whatever of difficulty presents itself in this case, then, is due rather to the application of the principle; not its establishment.

But, in reality, the application of the rule to the facts in this case, is as easily made, when properly appreciated, as its own establishment in the first instance.

It will hardly be controverted, I think, that the principle of law above stated is alike applicable to all forms of negligence on the part of a public carrier towards its passengers; not only in the matter of its construction, equipment, appliances, ways and means, but, as well, in the operation of its business, and the service of its servants or agents in charge of its cars, when thus engaged in the operation of its business. This, both on reason and authority, as it is gleaned from text book and precedent.

Under the variant situations of fact in which the multitudinous cases through the books have arisen, not one, so far as observation discloses, has failed to recognize that the duty required of a carrier to its passengers is of the highest—next, indeed, to an absolute insurance of safety.

Of course, this principle does not apply in its utmost rigor where the contributory negligence of the plaintiff himself has intervened; but that phase of the case is at present beside the question we are now considering.

In ~~Railway~~ *vs. McCool*, 83 Ind., 392, where the passen-
~~Packet Co.~~

ger's injury was caused by the defendant's servants negligently suffering a bale of cotton goods to fall upon him, the court said:

"The duty of the carrier is substantially the same as to the capacity and conduct of the servants as it is in respect to the means of transportation; that the duty as to skill, care and diligence of the servants being essentially the same as that respecting machinery, there is no reason for making a distinction as to the burden of proof between a case where the act of the servant is the cause of the injury, and one where the injury is caused by the machinery."

So, where a conductor, who had been assisting passengers from a car, turned and commenced to talk to one who had alighted, and failed to assist a woman passenger then in the act of alighting, whereby the stool on which she stepped, turned with her, because of the soft ground on which it rested, it was held, in *Railway vs. Reeves*, 116 Ga., 743, that the carrier was liable.

As was said by Grier, J., in *Railway vs. Derby*, 14 Howard, 468:

"A large proportion of the accidents on railroads are caused by the negligence of the servants or agents of the company. Nothing but the most stringent enforcement of discipline and the most exact and perfect obedience to every rule and order emanating from a superior, can insure safety to life and property."

The law is well stated in *Railway vs. Aspell*, 23 Pa. St., 147, 149, where the plaintiff went past his destination on account of a defective signalling bell used by the conductor to signal the engineer. The plaintiff seeing he had passed his destination, heedlessly jumped and hurt himself. The court said:

"Persons to whom the management of a railroad is entrusted, are bound to exercise the strictest vigi-

lance. They must carry their passengers to their respective places of destination, and set them down safely, if human care and foresight can do it. They are responsible for every injury caused by defects in the road, the cars, or the engines, *or by any species of negligence, however slight, which they or their agents may be guilty of.* But they are answerable only for the direct and immediate consequences of errors committed by themselves. They are not insurers against the perils to which a passenger may expose himself by his own rashness or folly."

In *Railway vs. Horst*, 93 U. S., 291, the plaintiff was a farmer traveling with his cattle, and was directed by the conductor to go on the top of the train, from which position he was shaken by the improper jolting of the train. It was held that:

"The rule of law that the standard of duty on the part of a carrier of passengers should be *according to the consequences that may ensue from carelessness*, applies as well to freight trains as to passenger trains. It is founded deep in public policy; and is approved by experience and sanctioned by the plainest principles of reason and justice."

It will be noticed that the negligence in this case assumes the common, every-day form; that is to say, it is brought about by the improper operation of the train, or of the cars composing it, by those agents or servants of the company who were in charge.

147 U.S. 571

Likewise, in the *Harmon* case,^{147 U.S. 571} which went up to the Supreme Court of the United States from this jurisdiction, where the negligence was in unduly starting the car after its stop had been signaled for by a passenger intending to alight. In this case it was held that:

"It was the duty of the defendant to safely carry and deliver the passenger, and in so doing not only to provide safe and convenient means of entering and leaving the car, but to stop when the passenger was

about to alight and not to start the car until he had alighted."

"The duty resting upon the defendant was to deliver its passenger, and that involved the duty of observing whether he had actually alighted before the car was started again. If the conductor failed to attend to that duty, and did not give the passenger time enough to get off before the car started, it was necessarily this neglect that did the mischief. It was not a duty due to a person solely because he was in danger of being hurt, *but a duty owed to a person whom the defendant had undertaken to deliver and who was entitled to be delivered safely by being allowed to alight without danger.*" * * *

"If the conductor negligently failed to observe whether plaintiff had alighted, or knowing that he had not, negligently started the car too soon, and in consequence of that, a sudden jerk of the car took place and threw him down, and that was the immediate cause of his falling, and the accident would not have happened but for that fact, we think it clear that such negligence as might be imputed to the plaintiff in being upon the step at all, could not, under the circumstances supposed, be properly held to have been contributory negligence. To hold so would be to determine that a carrier could defend his own negligence in the particulars named, upon the ground that if the plaintiff had not been there he would not have been hurt. It may be said that he placed himself where he was in risk of falling off, but that was a risk he could not have anticipated as the result of a sudden start before he had got off, because he had a right to assume that the car would actually stop to allow him to get off, and if it had, as it should have done, upon the hypothesis of the instruction, no accident would have happened. The injury ensued directly from the defendant's negligence, and that was its proximate cause."

"Inland and Seaboard Coasting Co. *vs.* Tolson, 139 U. S., 551, 558."

These two last-mentioned cases are cited at this point merely for the purposes of comparison. In each the negli-

gence was the result of carelessness on the part of the carrier's employes in carrying on its business. In each a passenger was injured. The duty imposed by law on the carrier, in every case, as we have seen, is to deliver its passengers safely, so far as *its* care can bring that about. Now, whether the negligence occurs in colliding one car with another, or in not allowing a person to safely alight before the car was started again, after stopping, can certainly in nowise differ in the principle involved from its negligence in throwing an intending alighting passenger, because of some danger encountered by that passenger, that is known of to the carrier, and may not ~~reasonably~~ be known of by the passenger unless warned against it. This, because whether the car is moving imperceptibly, and the passenger may reasonably believe it to be at rest, or because the place to alight is a dangerous one and may likewise be unknown of by the passenger. The duty is to deliver safely if it can be done, and unless there be intervention on the part of the passenger, of such sort as to make his own hurt the result of his own negligence, the carrier may be held to be liable.

Railway *vs.* Grant, 11 App. D. C., 107, 112, 113.

Railway *vs.* Lusby, 12 App. D. C., 295, 301.

Railway *vs.* Hill, 34 App. D. C., 304.

Railway *vs.* Wathen, 38 Wash. L. R., 735, 736.

See also

Steamboat Co. *vs.* Brockett, 121 U. S., 637, 645.

Railway *vs.* Bates, 103 Ga., 333.

Whalen *vs.* Railway, 61 N. J. L., 606, 611.

Nichols *vs.* Railway, 168 Mass., 528, 530.

Railway *vs.* Nugent, 86 Md., 349, 356.

It has been held by unquestionable authority that greater care is expected from street railroads than those of steam, but I take it this means only relatively, and because in every practical operation those in charge not only have increased

risks from the busy life of a city, thus enhancing their measure of care, but as well can they better attend to and guard the safety of the passengers, from the fact that the street car, and those aboard, can nearly always be under the observation of those in charge of them.

Ency. Ev., vol. 12, p. 135.

Ry. *vs.* Jones, 1 App. D. C., 200.

Anderson *vs.* Ry., 12 Ind. App., 194.

Then, too, the fact that appellant was an old man, nearly eighty-four years of age, and that he looked very feeble, must not be lost sight of in the equation; for this was one of the present conditions admeasuring the carrier's duty, although ignored by the learned trial court.

For, as was said by the court in Ry. *vs.* Finley, 79 Texas, 85:

"We do not understand it to be a rule of law that a carrier owes to every passenger precisely the same care, without respect to age, sex, or bodily infirmity. The degree of care is the same,—that is to say, the greatest care,—but what would be sufficient to insure the safety of one person, may not be sufficient for others physically less able to take care of themselves."

To the same effect see:

Nellis on Street Railroad Accident Law, sec. 1904.

Nelis on Street Surface Railroads, p. 455.

Ry. *vs.* Reeves, 116 Ga., 743.

Ry. *vs.* Miller, 79 Tex., 78.

Ry. *vs.* Shaw, 75 S. W., 713-715.

It being the duty of the appellee railroad company, then, to deliver appellant safely at his alighting destination, if by care and circumspection of the highest order it could do so, what, if any, was its breach on the present occasion?

To properly and fairly determine this we shall have to go still further into our inquiry as to appellee's full measure

of duty when applied to the facts in this case; for thus far we have only proved it relatively and abstractly.

Let us now apply it in order that the concrete question may be stated and worked out to its ultimate conclusion.

The question is whether appellee's conductor, a man of thirty-three years of age, and of nearly ten years' experience in that particular service of the railroad company (R., 16, 17), and necessarily familiar with its rules for his guidance, knowing that it was his business to be "on the platform and on the lookout for passengers who wished to take or leave the car * * * and try and prevent them from boarding or leaving the car while * * * in motion" (R., 18), and admitting for the fair presentment of the question that the conductor, was in fact, on the front platform of the trailer car, as he himself testifies (R., 13, 17), knowing that the car was moving (R., 17, 18), and standing as he was within a foot or two of appellant—this feeble-looking old man (R., 13)—facing him as he came out on the rear platform of the front car and stepped down on the step, preparatory to alighting, wholly unoccupied with other duties—for there were only four other passengers besides appellant on the train (R., 17)—and knowing appellant was going to alight at this point (R., 18)—for he had given him a transfer for this purpose (R., 5, 18)—and saw appellant with his own eyes as he left his seat (R., 17) and came down the aisle of the car (R., 17), through the doorway out on to the platform; knowing, too, that he was an old man, that it was dark and that the car had not quite stopped (R., 17, 18), although moving very slowly and very gently, without irregularity or jerk (R., 17, 18, 13, 12, 15), which might well be unknown of to appellant—as it was in fact (R., 7, 8)—was he or was he not in the exercise of that degree of care that the law imposed upon him under the above-recited conditions, bound to warn appellant of the existing danger?

In *Mearns vs. Railway*, 48 N. Y., Supp., 366, 367, 368,

plaintiff was a passenger upon one of defendant's vestibule trains. As it drew into the station the conductor called out "All out, Jersey City, last stop." Plaintiff holding an umbrella and bag then walked to the end of the car and waited. According to his testimony the conductor unfastened and opened the vestibule door and plaintiff started to alight. The conductor was then facing him. The car was still in motion, but plaintiff did not know it. There was a light at the top of the steps but it was dark outside. The motion of the car was perfectly smooth, there was nothing to indicate to plaintiff that the car was not at rest. He held the side rail with one hand as he stopped down and as he attempted to step on the station platform he was thrown down and run over. *Held*, that the plaintiff's contributory negligence and defendant's negligence should have been submitted to the jury. *The Court said:*

"The conductor knew or should have known that the car was in motion at the time he invited the plaintiff to alight. There was evidence that the conductor was facing the plaintiff and saw that the latter was acting upon his invitation. If it was dangerous for the plaintiff to do what he was thus invited to do it was the conductor's clear duty to check him, or at least inform him of the danger. The jury might well have found upon the evidence that the conductor neglected his duty. At all events the question was for them.

As to the plaintiff's freedom from contributory negligence. There was no question of his getting off a car which he knew to be in motion. The real question was whether he should have known that it was in motion. Upon the evidence that question was also for the jury. The plaintiff certainly had the right to assume that when the conductor said all out the train was about to come to a full stop. The respondent says that this call of the conductor was merely a preparatory notice. Admitting this to be so the plaintiff only acted upon it as such. He did not immediately attempt to leave the car, nor in fact could he have

done so as the vestibule door was fastened. He simply prepared for his exit and this preparation was quite leisurely. When, however, the conductor followed this preparatory notice up by opening the vestibule doors, the plaintiff naturally proceeded at once to alight. The respondent contends that it was still his duty to look and see whether the train had come to a full stop. The plaintiff on the other hand contends that he had the right to assume that it had come to a full stop. We think that these defenses should have been solved by a jury. It is true that notwithstanding the conductor's words and acts, the plaintiff was still bound to exercise due care. Whether he did so or not was to be considered in the light of the attendant circumstances. The jury might well have found that he had, in consequence of the conductor's words and acts, warrant for the belief that the train had come to a full stop, and that he acted upon a justifiable sense of security caused by these words and acts. The plaintiff, as we have seen, testified that he did not observe that the train was in motion and the entire absence of ~~the~~ jar tended to confirm the impression which had been conveyed by the opening of the vestibule door, namely, that the car was at rest. Nor would the light which shone over and from the vestibule steps necessarily have indicated even to the most careful observer that the train was still in motion. There is no evidence that there was in the neighborhood upright objects, which, as the train glided past them, would have indicated motion. It is well known that where a gleam of light falls from a moving train upon a perfectly smooth exterior surface, the train itself frequently appears to be stationary. The stream of light naturally moves forward with the train and gives to it a stationary effect. At all events the inference to be drawn from the facts and from the inferential consideration to which we have adverted pro and con was properly for the jury; and as the plaintiff was non-suited he is entitled to the most favorable inference deducible from the evidence.

Under this rule it is entirely clear that the question of the defendant's negligence and of plaintiff's freedom from contributory negligence should not have been withdrawn from the jury.

All concur."

In Thompson on Negligence, vol. III, section 2843, the rule in the above case is thus laid down:

"It is the obvious duty of a railway carrier of passengers, through its servants, to warn the passengers of any source of danger known to the carrier and not likely to be discovered by the passenger in alighting from the carrier's vehicle."

In Wharton on Negligence, sec. 649, it is said:

"When a danger approaches (a carrier) it is the duty of the officers of the road to notify passengers so that they can take steps to avoid it; and failure to give such notice is negligence. So, also, if there is a dangerous place at the landing, it is the duty of the conductor to warn those about stepping out." "And." he adds, * * * "He must give notice to all if any danger in alighting is probable."

Hutchinson says in his excellent treatise on carriers, at page 1003, and in part of section 898:

"And where the circumstances seem to require it, the carrier would owe to his passenger the duty of warning him against danger and of cautioning him against acts of imprudence which endanger his safety."

In 6 Cyc., at page 641, the principle is thus announced:

"It is the duty of a carrier of passengers to give the passenger notice or warning of dangers which are unknown to him, and for an injury resulting from the neglect of this duty it is liable."

Nellis in his work on *Street Surface Railroads*, p. 455, says:

“He” (the carrier) “is bound to warn a passenger whom he actually sees in a position or place of peril to life or limb, and contributory negligence is not a legal excuse for the non-performance of such duty.”

In *Ry. vs. Mullen*, 217 Ill., 203, where a passenger was injured when attempting to alight from a moving car propelled by steam, upon invitation of an employé on board the train, under the mistaken belief that the train had stopped, the court held that:

“A railroad company is responsible for injury to a passenger whom its conductor and brakeman permit to leave a moving train in the dark, under the erroneous impression that the train had reached his destination and stopped.”

In *Railway vs. Scott*, 86 Va., 902, 905, 907, where the question arose on the proximity of a dangerous excavation adjacent to the tracks, and close to where the plaintiff was alighting at night, the court said:

“Here the action against the defendant is not founded upon negligence in allowing the excavation to remain without proper safeguards or lights, but it arises out of the duty which every carrier of passengers is under not to expose his passengers to any danger in alighting which can be avoided by the exercise of extreme care and caution * * * ‘Passenger carriers bind themselves,’ said a learned author, ‘to carry safely those whom they take into their coaches as far as human care and foresight will go—that is, to the utmost care and diligence of very cautious persons.’”

Likewise in *Sweet vs. Railway*, 113 Ky., 15, the question arose on a similar state of facts, and it was held that:

“While a street railway company is not bound to furnish safe places for depositing its passengers, yet

where the dangerous condition of a street, at the place of discharging a passenger is known, or is such as must be known to the carrier, and is unknown to the passenger—as where because of the darkness he cannot see it—the carrier is bound to warn him of the danger, or to assist him in safely alighting.”

So, too, in *Traction Company vs. Morvilius*, 31 Ind. App., 464, in adhering to this principle, the court said:

“The strict obligation of the carrier of passengers continues not merely while the passenger is being received and is being carried, but also while he is leaving or alighting from the carriage or car; and an electric railway company, operating its cars on tracks in a city over a street in which excavations were made by the city adjacent to the tracks, is liable for injuries received by a passenger in getting off a car stopped to let off passengers opposite such excavations, where no notice or warning was given the passenger of the excavation. * * *

“The appellant, through its servants in charge of the car, having knowledge of the condition which rendered alighting in the dark from the car dangerous for passengers who were ignorant of the excavation, owed the passenger the duty of taking reasonable precautions, or giving reasonable warning for the protection of the passenger.”

In *Romine vs. Railway*, 24 Ind. App., 230, plaintiff, a passenger on defendant's train, was standing inside the car looking through the window of the rear door, with his hand resting against the casing of the closet door, when the conductor approached, opened and closed the closet door quickly, and plaintiff's finger slipped into the crack when the door opened and was crushed by the door when it was closed. It was held that the question of the carrier's negligence should have been submitted to the jury.

Again, in *Sweeney vs. Railway*, 150 Mo., 385, 399, the passenger notified the gripman that he wished to get off at

a certain point, and as the car approached that street he got out on the running board, as was customary, so as to be ready to get off when the car stopped. The gripman failed to stop the car there, and the passenger continued to stand on the running board; but before the car reached the next street it collided with a broken-down wagon on the track and injured him.

Said the court:

“The implied contract which a common carrier owes to a passenger is to carry him safely, and if the passenger be injured by the carrier while the relation of carrier and passenger exist, the burden is upon the carrier to show that the injury was not occasioned by its negligence. And the greatest care is required of the carrier to avoid the injury. * * * The evidence was that the gripman could have seen the wagon, had he been looking, in time to have stopped the car before the collision occurred, and that the owner of the wagon ran up the track and warned him of the danger, which he failed to heed. * * * Even if Sweeney saw the danger in time to have stepped back into his seat, or a place of absolute safety, he had the right to assume that he would be carried safely, and that the gripman would have seen the obstruction and have stopped in time to have prevented a collision with the wagon.”

In *Railway vs. Wathen*, 38 W. L. R., 735, 736, where there was a dangerous excavation alongside the tracks of the railway company where the car had stopped to allow a woman passenger to alight, it was held that:

“A street railway company is under a duty to warn passengers of the existence of hidden dangers known to it, when it chooses to stop its cars where such hidden danger exists.

“To hold as matter of law that the plaintiff should have observed the existence of this excavation and that the defendant had the right to assume that she would, would be a usurpation of the functions of the

jury. The question, in our view of the evidence, was clearly one for the jury. If, therefore, such a dangerous condition existed at the point of the accident as that the defendant was not justified in assuming that the plaintiff had observed, or would observe it in the exercise of due care, which as we have previously said, and which the court carefully instructed the jury, was to be determined with reference to the surrounding circumstances, it clearly became the duty of the defendant either to assist the plaintiff in alighting, or to warn her of the danger. * * * If the danger is known or should be known to the railway company, and it is of such a nature that a passenger, in the exercise of due care, will not be likely to observe it, it is the duty of the company, if it stops its car at such a place, to notify passengers of the danger."

See also

Nellis Street Railroad Accident Law, sec. 1904, pp. 116-118.

Flack *vs.* Ry., 41 App. Div., N. Y., 399.

Ry. *vs.* Davidson, 22 C. C. A., 306, 309.

Ry. *vs.* Horst, 93 U. S., 291.

Ry. *vs.* Manning, 170 Ill., 417.

Ry. *vs.* Cook, 12 Tex. Cir. App., 203, 214.

Taber *vs.* Ry., 71 N. Y., 489, 493.

Weller *vs.* Ry., 9 Law Rep. (C. P.), 126.

Ry. *vs.* Coulbourne, 69 Md., 360.

It follows from the foregoing that no matter in what form the danger exists, or is to be apprehended, if it be known of to the carrier, or in the exercise of that high degree of care that the law imposes upon it, it ought to have been known, and there is a bare possibility, even, that the passenger does not realize it or appreciate it, then it is not only the duty of a carrier to warn a passenger seeking to alight, but a failure so to warn is negligence.

What matters it whether the danger is to be apprehended

from a hole in the ground, or because the car is so slowly and imperceptibly moving as that motion is not discernible to the ordinary person?

The consequences from a failure to warn from either source of danger are the same.

It may possibly happen that one form of danger is more readily discernible than the other, and may, therefore, be the more easily guarded against. But such merely concerns a plaintiff's own contributory negligence. It lends to the determination of that question. Nothing more!

Has it not been said, and that by the most eminent authority we have (*Ry. vs. Horst*, 93 U. S., 291), that "the rule of law that the standard of duty on the part of a carrier of passengers should be *according to the consequences that may ensue from carelessness?*"

It is not reasonable care.

Greater, even, than that: the care to be asked for and expected from a carrier toward its passengers is such an admeasurement as to prevent injurious consequences, save as such consequences may be brought about by the passenger's own act, unavoidable accident, or the act of God.

Not, however, that appellee was to be held answerable for occurrences not naturally to be anticipated, and hence not naturally to be guarded against and avoided, for even in the exercise of the highest care "one from whom it is due is bound to guard only against those occurrences which can reasonably be anticipated by the utmost foresight," as was said by the Supreme Court of the United States in *Ry. vs. Calhoun*, 213 U. S., 1.

If, then, this be the rule of law governing the actions of a carrier towards its passengers in the absence of positive instructions from the carrier to its servants, *a fortiori* is this negligence indisputably fixed, when it assumes the very form of the carelessness thus sought to be guarded against.

In *Railway vs. Hill*, 34 App. D. C., 304, where the plaintiff was a woman passenger seeking to alight from one of its cars

at a regular stopping place in broad daylight. At the time she attempted to leave the car the exit next to the platform was obstructed by the motorman, who was engaged in conversation with a woman acquaintance, and he neither barred the exit on the other side from where he was standing nor warned plaintiff in time against using it. The passenger attempting to alight stepped down what was too great a distance, fell, and was injured.

This court in passing on these facts said:

"It is the duty of a carrier * * * to exercise the highest practicable degree of care for the safety of its passengers, not only in the matter of carriage, but also in respect of means for getting on and off its cars. * * *

"It is a matter of common knowledge that passengers on street cars frequently get off on one side as well as another, unless one way be obstructed by closed gates or doors; and the evidence showed that such practice had prevailed at the stopping place where plaintiff received her injuries. Charged with this knowledge, and knowing that the east side was unsafe, *the defendant recognized its duty to its passengers, at that point, in the strict rule that passengers were to be made to get off on the west side only, to which rule its conductor testified. This duty was not discharged by making such rule, merely, but extended to reasonable and effective means for its enforcement by barring the way or the giving of timely warning.* As it is certain that there was no bar or closed gate on the east side of the car to prevent egress, and as the plaintiff's evidence tended to show that the western exit was obstructed by the motorman and his acquaintance, and that the motorman neither obstructed the eastern exit, nor warned plaintiff in time against using it, it was proper to submit the question of negligence to the jury. * * *

"The plaintiff was 59 years old; was near-sighted and wore glasses. It was not pretended that she was so nearly blind as to require a higher degree of care than other passengers, by a carrier having knowledge of the defect. A carrier must be presumed to know,

however, that persons of all ages and conditions, strangers as well as those familiar with the surroundings, near-sighted people wearing glasses, as well as those of perfect sight, are frequently among its passengers, and it is required to provide appliances, ways and means adapted under the circumstances to the safe transportation of all such persons."

Where a passenger was injured while alighting from a street car by reason of the slippery condition of the steps, and by the *rules of the company* it was the duty of the conductor in case of a storm to sprinkle sand on the steps and platform, and he was provided with sand for that purpose, a finding was warranted that *defendant had undertaken to prevent, and could have prevented*, the steps from being slippery.

Foster *vs.* Railway, 182 Mass., 378.

In Railway *vs.* Bates, 103 Ga., 333, the question was somewhat similar to that of the Hill case, *supra*, except that the danger in this case was from a passing car, while in the Hill case it resulted from the step being too high from the ground. In both cases there was no guard to prevent the passengers from getting off on the dangerous side of the car. In both cases the negligence assumed the form of the infraction of the rule framed to prevent the very consequences of such carelessness.

The court said:

"The relation of common carrier and passenger exists between a street railroad company and a passenger until he has reached his destination and has had a reasonable opportunity to alight safely from the car; and the carrier during this period is bound to extraordinary diligence on behalf of itself and its agents to protect the life and person of the passenger.

"This doctrine of extraordinary diligence is not only applicable to the agents of the carrier on the car on which the passenger is traveling, but also to its agents having control of another car ap-

proaching on a parallel track after the latter have discovered that the former car was about to stop for the purpose of discharging passengers who might alight dangerously near such parallel track. * * *

A rule of the defendant company *requiring its motormen to keep their cars under full control in approaching on a parallel track after the latter has a car standing at a crossing, taking on or letting off passengers; or if they see that they are about to meet a car on a street crossing, to slow up and see that the track is clear before attempting to pass, was admissible in evidence as tending to show that the company regarded such a point on its line when being approached by one of its cars as more or less dangerous to passengers and others.*"

Likewise in *Warner vs. Railway*, 168 U. S., 339, 347, 348, which was a case that went up from this District (being reported in 7 D. C. App., at pages 79, 84, 85), where one, constructively a passenger was crossing the B. & O. railway tracks at University Station in order to catch an accommodation train on the other track to return to Forest Glen, for which he held the return part of his round-trip ticket, when he was struck by an express train going in the opposite direction, it was held that:

"The rule of the defendant company that 'when one passenger train is standing at a station receiving or discharging passengers on a double track, no other train, either passenger or freight, will attempt to run past until the passenger train at the station has moved on, or signal is given by the conductor of the standing train for them to come ahead, and the whistle must not be sounded while passing a passenger train on a double track or sidings, unless it is absolutely necessary,' is a proper one and applies to this case. * * *

"A railroad company owes to one standing towards it in the relation of a passenger a different and higher degree of care from that which is due to mere trespassers or strangers, and it is conversely

equally true that the passenger, under given conditions, has a right to rely upon the exercise by the road of care; and the question of whether or not he is negligent under all circumstances must be determined on due consideration of the obligations of both the company and the passengers." * * *

"In *Railway vs. Lowell*, 151 U. S., 209 it was said:

"It is obvious there was no room reasonably to claim that it should have been determined as matter of law, that the railroad company had not been negligent. In the *Lowell* case, as in this, it was shown that a rule of the company applicable where double tracks were operated, prohibited any train, either passenger or freight, from attempting to run past a passenger train standing at a station for the purpose of receiving or discharging passengers, until the passenger train at the station had moved on, or signal was given by the conductor of the standing train for the other to come ahead. *Speaking of such a rule, and after declaring that it could not be seriously contended that the defendant was free from fault in failing to stop its train, in compliance with its own rule,*' the court further said:

"In view of the frequency of accident occurring to passengers crossing one track at a station after alighting from a train standing upon another track, *the rule is doubtless a proper one*, and if it had been observed on that evening this accident probably would not have occurred.' "

This, too, was a case similar to the *Hill* and *Bates* cases, and the Supreme Court of the United States says, in the *Lowell* case, and reiterates and affirms it in the *Warner* case, "that it could not be seriously contended that the defendant is free from fault in failing to stop its train in compliance with its own rule."

It may well be that the engineer in these cases "did not know" a passenger would be in a position where he would be struck by the train, and in the *Hill* case, that the conductor "did not suppose" the passenger would seek to alight upon

the dangerous side of the car in broad daylight. Yet, was it not the business of these agents and servants of the carrier to know, or at least to take the precautions that their masters instructed them they must take?

As says the Supreme Court again, in this Lowell case, "In view of the frequency of accidents occurring to passengers crossing one track at a station after alighting from a train standing upon another track, the rule is doubtless a proper one, and if it had been observed on that evening, this accident probably would not have occurred."

We know how many accidents are brought about as in this case by persons getting off a moving car. Here was the rule to prevent such a happening. There was no reason why the conductor should not have observed the rule. It was **a proper one.** In our daily experience on the cars we have heard the warning time and time again, and as was said in Cann's case, 72 Md., 381: "Judges cannot deinde themselves of the knowledge of the incidents of railway traveling which is common to us all." Please wait until the car stops! In **broad daylight as well as at night**, its frequency demonstrates its necessity. A few simple words. Easily spoken. No effort required. Yet the only excuse offered on behalf of appellee by its conductor is "that he didn't know" that appellant was going to get off the car. He wasn't, even, otherwise occupied. No excuse. Nothing to say for the infraction of his own rules, although such negligence might well foretell just such consequences as happened. No explanation of why this old gentleman should go down into his grave a helpless cripple, with his remaining days filled with dreadful pain and suffering. Nothing! nothing; save that "he did not suppose he was going to step off" the car. Often have we heard the warning. In broad daylight at times it has seemed unnecessary. But how doubly necessary was it this night. The direful consequences tell. Ample the time and opportunity. Appellee's rules called for it. Its conductor failed to obey these rules. Appellant was hurt in consequence.

This is the breach of appellee's duty to carry appellant safely, so far as that depended upon its own care.

It is this that constitutes appellee's negligence—negligence at least that should have gone to the jury for determination—notwithstanding the fact that the learned trial court insisted upon determining it adversely to appellant's lawful rights as a matter of law.

That this negligence was the proximate cause of the injury complained of is apparent, for in *Scott vs. Railway*, 43 Atl., 1060, 1061, where the alighting passenger was thrown off by a sudden jerk of the car, the court said:

"The crucial question in the case is, what caused her to leave the car so as to fall, and whether the cause, whatever it was, was one attributed to some fault on the part of the employés of the railroad company. The railroad company was a common carrier of passengers, and as such it and its employés owe to the passengers a high degree of care for the safety of the passengers, and they are bound to exercise a high degree of care to get them safely to the journey's end. * * *

"Now, * * * picture to yourselves, as far as you can, the condition of things when the plaintiff came to the rear platform, and whether the evidence indicated satisfactorily to you, that *her parting from the car*, as she did, was by some fault of the employés of the company, or some failure of duty on her part."

So in the present case, as in all such cases, the question is who occasioned the accident? Of course, if appellant had been warned, he would not have stepped from this moving car, and the accident would not have happened. That was the negligence complained of, and that it was the proximate cause of the injury cannot be successfully controverted. The mere fact that after a failure to warn, a passenger steps into a hole in the ground, or upon the street while the car is mov-

ing, makes no difference. The direct, proximate, and efficient cause—the moving cause—what led or occasioned appellant to leave the car, was this failure to warn him that the car was still in motion.

II.

Appellant Was Not Guilty of Contributory Negligence as a Matter of Law.

Coming now to a consideration of the above question, it will be briefly shown that the facts in this case do not warrant any such conclusion of law.

It behooves us first to consider somewhat briefly the fourth, sixth, and seventh assignments of error.

These affect the question of appellant's contributory negligence.

As to these assignments of error it is somewhat difficult to understand what was in the mind of the learned justice at the time of the trial below. Whether the entire consideration of the question of the contributory negligence of appellant was eliminated because of the fact that no negligence had been proven against appellee; or was it because the court could say, as matter of law, that if appellant got off a moving car he was guilty of such contributory negligence as that he could not recover?

For whatever reason, the question was entirely ignored, although there is no principle of law better established in this District than that, where the defense, in a tort ~~of~~ action, is contributory negligence, the defendant must show it by a preponderance of the proof.

Harmon vs. Ry., 18 D. C., 255 (affirmed in 147 U. S., 571).

Railway vs. Chapman, 26 App. D. C., 472.

The learned trial court said, time and time again, and so instructed the jury, that if appellant got off a moving car he could not recover.

Why?

The fact that the car was moving when appellant sought to alight was ^{practically} conceded. Was it because of this? No reason was given to the jury. Yet it is not negligence *per se* to get off a moving car, say the authorities, and such actions nearly always present a question for the jury to pass upon.

Clark's Accident Law, sec. 59 *et seq.*

Railway *vs.* Smith, 59 Tex., 406.

Railway *vs.* Rushing, 69 Tex., 306, 317.

Railway *vs.* Meixner, 160 Ill., 320, 325-328.

Munroe *vs.* Railway, 50 N. Y. Super. Ct., 114.

Railway *vs.* James, 121 Ala., 120.

Railway *vs.* Maugans, 61 Md., 53, 61.

Morrison *vs.* Railway, 56 N. Y., 302.

Railway *vs.* Coulbourn, 69 Md., 360.

Railway *vs.* Gardner, 60 N. J. L., 571.

United Railways *vs.* Weir, 102 Md., 290.

United Railways *vs.* Woodbridge, 97 Md., 636.

Next as to the inducement or invitation that gave to appellant the right to believe that the car had stopped and that he must alight.

Appellant certainly had the right to expect active care for his protection, for he was in the position of a bailee, having entrusted himself into appellee's safe keeping.

Says Clark in his Accident Law, chap. IV, sec. 59:

"A passenger is entitled to a reasonable opportunity to alight, if a street car has * * * been slowed up to such an extent as to constitute an invitation to alight."

And

"Actual or express notice is not required if the

conductor knew or ought to have known that the passenger was in the act of alighting."

Railway *vs.* Grant, 11 App. D. C., 107.

Railway *vs.* Rammaker, 21 Ky. Law Rep., 250.

In the Hill case, *supra*, the third instruction given by the trial court, to the effect that "If plaintiff was a passenger, she had a right to assume that any place where the car was stopped for her to alight would be reasonably safe; and she had a right to regulate her conduct on that assumption, and the degree of care she was bound to exercise was only such as a person of ordinary care, acting under such assumption, would have exercised under the circumstances of the case," was duly approved by this court as containing a correct exposition of the law.

Likewise in *Leveret vs. Ry.*, 34 So., 579, it was held that:

"Parties embarking on or alighting from railway trains upon the invitation, express or implied, of its officials, are justified in acting upon the assumption that the officials have taken proper precautions to insure their safety."

In *Railway vs. Arnol*, 144 Ill., 261, 269, where plaintiff passenger was riding in a "caboose" attached to a freight train and was thrown down by a jerk after she had arisen from her seat to alight, it was said:

"The implied contract to carry safely necessarily includes the furnishing of reasonable opportunity to alight from the train safely at the end of the journey.

"Whether appellee was, under the circumstances shown, justified in assuming that it was the intention of those in charge of the train to discharge passengers for Shirley at the time and place of the first stop of the caboose in which she was riding, was a question of fact for the jury. If the conduct of appellant's servants and their management of the train amounted to an invitation to then alight, and would be so understood and acted upon by reasonable and

prudent persons, and appellee acting in good faith upon such invitation arose upon the train coming to a standstill for that purpose, the jury would be justified in finding that she was in the exercise of ordinary care for her own safety. If she by reason of such apparent invitation was placed in peril from the further movement of the train, the duty at once arose on the part of the appellant to stop its train a sufficient length of time to permit her to leave it in safety or to warn her of the danger in time to avert injury. And it could not in such case be material whether the shock to the train producing the injury was an incident of the ordinary operation of the train, or was extraordinary and unnecessarily violent. The duty of the carrier was to be measured by the peril to the passenger whom it had accepted and undertaken to safely carry, and who had been induced by the conduct of its servants to assume a position of danger."

The case of *Railway vs. Mullen*, 217 Ill., 203, is very fully and carefully considered on this point.

See to the same effect:

Railway vs. Davis, 103 S. W., 603.

Sowash vs. Ry., 188 Pa. St. Rep., 618.

Railway vs. Hellawell, 26 L. T. N. S., 557.

Nance vs. Ry., 94 N. C., 619, 623.

Wolford vs. Ry., 102 N. Y. Supp., 1008.

Bridges vs. Ry., 7 H. L., 213, 222, 228.

Robson vs. Ry., L. R., 10; Q. B., 271.

Rose vs. Ry., Law Rep., 2; Exch. D (C. A.) 248.

Railway vs. Buck, Adm'x, 96 Ind., 346.

Warner vs. Ry., 168 U. S., 339, 347, 348.

But what are the facts in this case that evidenced this inducement or invitation?

It was at night; the conductor knew appellant wanted to alight at this transfer station; the car was without motion

to the untrained observer, and was deemed to be at rest; there was no warning from the conductor, although his rules required him to give one, and, in the absence of such, it is submitted there was the additional assurance of his presence within a few feet of appellant that acted as an inducement for appellant to step off.

This custom to cry a warning can be judicially noticed, for "Courts will not pretend to be more ignorant than the rest of mankind," as was said in *Munn vs. Burch*, 25 Ill., 35.

Railway vs. Brown, 29 App. D. C., 473, 476, 477.

Railway vs. Hill, 34 App. D. C., 304.

Hart vs. Railway, 38 W. L. R., 716.

And that although well lighted around there by electric lights, as testified to by appellant himself, that will not alone be sufficient for the court to say as a matter of law that appellant was guilty of contributory negligence; for not only was the presence of the conductor sufficient assurance that he would not be allowed to get off a moving car without warning, but as is well known, and a matter of common knowledge, deep shadows always lurk immediately adjacent to a car, where one's eyes would naturally be fixed when alighting, and that, together with the further fact, equally apparent and well known to the ordinary observer, that the light shining from the car itself upon a perfectly smooth exterior surface, and moving forward abreast of the car, adds to and increases, rather than diminishes, the chances of an unpracticed and untrained eye being led into believing that the car had stopped.

Railway vs. Hart, *supra*.

Mearns vs. Railway, *supra*.

Mosheuvel vs. D. C., 191 U. S., 247.

For the reasons that there was enough evidence in this case to be submitted to the jury on the duty of the appellee

railway company to warn under all the facts and circumstances in the case, and because there is no such contributory negligence in this case as will warrant a court in so finding as matter of law, it is urged that this case be reversed and remanded for a new trial.

Respectfully submitted,

LEONARD J. MATHER,
Attorney for Appellant.

[9541]

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

DEC.--6-1910

Henry W. Rodgers
W. H. K.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1910.

No. 2196.

WILLIAM H. HUTCHINSON, APPELLANT,

vs.

CAPITAL TRACTION COMPANY, A CORPORATION,
APPELLEE.

Brief for Appellee and Defendant Below.

R. ROSS PERRY,
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Brief for Appellee and Defendant Below.

Concise Statement of the Case.

Inasmuch as this brief must be prepared before the brief for the appellant has been filed, counsel for the appellee can not anticipate the contents of that brief. Their brief, therefore, is necessarily prepared at large, and can not, in advance, concede the correctness of the statement of fact which will be contained in the appellant's brief, nor can it follow the assignments of error or the order of their discussion which appellant's counsel will adopt.

I.

Pleading.

On the 15th of March, 1910, the appellant, as plaintiff, filed his second amended declaration against the appellee as defendant in case for negligence, No. 51,179, at law, in the Supreme Court of the District of Columbia. The substantial averments of the declaration are that on the 29th day of March, 1908, the plaintiff boarded one of the cars of the defendant, a public service corporation,

and was a passenger on said car on its Fourteenth street line, upon which the plaintiff was going south. The averments in the declaration with respect to negligence are general, and are as follows:

That it "was the duty of the said defendant corporation to carry him (plaintiff) safely as such passenger, and safely allow him to get off said car at his alighting destination; but notwithstanding its said duty in this regard, and when the car upon which the plaintiff was going south reached its regular stopping place near the corner of Fifteenth and G streets northwest, said plaintiff, himself in the exercise of due care, sought to alight therefrom, and in so doing, with due care and caution on his part, and while still a passenger, was violently thrown from said car to the ground by and through the negligence and incompetency of the officers, agents, or servants of said defendant corporation, who were then and there in charge and control of said car, and as well of the safety of its passengers alighting therefrom, as aforesaid, and was thereby permanently injured," etc. Damages are claimed in the sum of \$20,000 (Rec., pp. 1 and 2).

To this declaration the plea of "not guilty" was filed and issue joined thereon (Rec., p. 3).

On the 24th of March, 1910, the jury trying the said cause found a verdict for the defendant (Rec., p. 3). Thereupon a motion for a new trial was filed, which was heard and overruled on the 8th day of April, 1910, and judgment was entered upon the said verdict, from which an appeal was taken, upon which appeal the cause now comes on for hearing (Rec., pp. 3 and 4).

II.

Evidence.

While the plaintiff's declaration carefully avoided any specific averment of negligence, nevertheless the plaintiff testified to specific acts upon which he charged negli-

gence of the defendant carrier in the premises. He says substantially as follows:

I am the William H. Hutchinson who was hurt on a car of the Capital Traction Company on the night of March 29, 1908; I am 83 years and 8 months old. I boarded a 14th street Capital Traction Company's car at 14th and Monroe streets, taking a seat in the forward car up close to the motorman's platform. Nothing occurred of any consequence until we got below Thomas Circle, when the conductor said something about 'transfers for Georgetown.' I asked for a transfer and received it. It was between nine and ten o'clock. The car swept along and turned New York avenue into 15th street, near the junction of G, and stopped. *I did not make any effort to rise until I was positively sure that the car had stopped.* I was going to take the Georgetown car. *When I was positive that the car had stopped* I had nobody to look after but myself, and I arose and walked down the car very slowly, past the conductor in the center of the car. I slowly passed down, and as I passed the conductor I looked directly in his face. I do not know why. I passed on to the end of the car, on the platform. I do not know what induced me but I turned around and looked in the car. The conductor was in the same situation, in the act of laying his hand upon the bell-rope. Not only that but the motorman was peeping through the window. Evidently they were in a hurry to go. As I wheeled about I saw a train coming up north for Georgetown. The thought occurred to me and I walked towards that car and held on to the iron rod that supported the roof of the car, and I looked out. I saw it was dangerous, because there was a barrier there. I wheeled about and went west towards the exit, and looked in the car again. I saw the conductor in the same position. Not only that, I saw the motorman looking in the window at the forward part of the car. I moved forward two steps, took hold firmly of

the stanchion with my left hand and stepped off with my right foot directly on to the step below. I had my foot lifted, my left foot in mid-air, and quicker than a flash I was lying right under the car, right under the woodwork of the car, alongside of the moving wheel (Rec., p. 5). I ought to say here that when I fell I heard the bell signal for the car to go on; and not only that, I heard the lifting of the brakes, and I heard the connection of the electric power to the track, as distinctly as if I had been on the forward platform. The lights are abundant all around there (Rec., p. 6).

On cross-examination the witness says as follows:

I was born on the 26th of July, 1826, and was employed at the time this accident happened in the State Department printing office as a compositor. The car stopped opposite G street. I waited until the car had come to a full stop before I got up out of my seat, I was positive that car was as dead as a rock (Rec., p. 7). When I arose from my seat to alight from the car I was not particularly anxious or in a hurry to get the Georgetown car. I was willing to take my time. There was no car on the track at all until the Georgetown car came up, and when I got on the platform I saw with my eyes that was the car that I wanted, but it was unsafe to take it (Rec., p. 7). The conductor was in the center, or nearly the center of the car, with his hand apparently on the bell-rope. When I first got up there he was standing there. I don't know whether he was looking at me, but I looked at him when I passed him. I don't know why I looked at him—I thought he he was too young a man to have charge of so responsible a job at that time of night. That is what struck me. I had already gotten my transfer and the conductor could not help but see me. Then I went down the aisle and just as I got at the platform, I wheeled about and looked in the car and saw just what I have stated—the

motorman looking in the window and the conductor in the center of the car. The motorman was peering through the window. I won't say there was an iron gate on my car. I don't remember seeing it. But there was on the new train that came up. I saw it very plainly. I saw this Georgetown car coming up on the other track, and I saw very conclusively that I could not catch that car and then I turned around and passed again in front of the door of the car and looked in again and the conductor was still in the same position with his hand on the bell-rope. Every time I looked in that car the motorman was peeping in the window. I looked twice. Then I attempted to get off the car as quick as I could. I passed my right foot down as solid as I could on the step—on the first step below the car platform and held the stanchion firmly in my left hand. The Georgetown car had been halted and passengers were getting out and in. I was not intending to take that car. It had stopped firmly in its place.

"Q. Very well. Now, as you passed out, going over toward the Treasury side, and stood there with one foot on the step, and holding on to the stanchion, did you or not know whether the car was moving?

"A. I will take a double oath when I got my left foot in mid-air, to step down on the street, there was not any motion until I was pulled right over just like a flash of lightning. Just as I was stepping down and was thrown under the car, I heard the bell just as distinctly as if I was on the front platform.

"Q. You at that time had already gotten down to the step, and you were going from the step to the ground?

"A. Yes, sir.

"Q. When the two bells were given and the car started did it start as quickly as that?

"A. Just as quick as a flash. I put my hand on the rear part of that cold iron wheel, and I felt

the motion in my fingers, and I had the assurance of my eyesight and my feeling that that car was in motion as I was flat on the ground, my head above the car wheels. The car was going, and I put my hand on the wheel to satisfy myself that this was going. Just as I was falling down I heard that bell, and I heard the noise of the motorman in the front car. . . . I heard the two bells given to start the car and I heard the brakes disengage from the wheel, and then I put my fingers on the moving car wheel" (Rec., p. 8).

There was then given in evidence the following statement made by the witness on the first of April, 1908:

"On M'ch 29, 1908, about 8.30 o'clock P. M. I was a passenger in a south bound 14 st., car and seated in the forward part of the closed motor, close up to the motorman. While the car was slowing up for a stop at 15" and G. St. Junction I walked to the rear platform and by the time I reached the platform I think the car had come to a stop but I could not swear to that. I stepped down to the lower step and then I found that the car was in motion, the car had evidently started while I was stepping from the platform to the step. I stepped to the ground and as soon as my foot touched the ground I felt the car was in motion. I do not think I was holding on to the handle at the time. I fell to the ground and the car came to a stop within about two feet after I fell. The conductor at the time was in the front part of the closed motor and he came to my assistance. There was only about two other passengers in the motor and a lady left the car after I had fallen. I do not know who that lady is but the conductor took her name. I cannot recall if the conductor rang the bell to start the car or not while I was in the act of getting off."

"WM. H. HUTCHINSON.

Mrs. E. M. ATEN,
3497 *Holmead Pl.*
Apr. 1st, 1908."

The circumstances under which this statement was given are testified to by the plaintiff (Rec., pp. 9 and 10), and by Alfred Wilkinson, one of the claim agents of the defendant, who took the statement, and whose testimony will be found at page 15 of the record. On page 19 there is the testimony of Harriet A. Aten, who signed the said statement as a witness, and of Everett M. Aten, her husband, as to the fact that the plaintiff was suffering greatly when the said statement was taken.

On this point the testimony of the witness Wilkinson (Rec., p. 15) is to the effect that on the occasion when the statement was taken the plaintiff was very sociable and said nothing about his suffering intensely; that he, Wilkinson, was there about half an hour when he (plaintiff) signed the statement, and his daughter who was there witnessed it. The plaintiff made no objection to telling witness what he knew about the case, nor did the plaintiff's daughter say her father was suffering and that witness had better call again. That the plaintiff signed the statement in the presence of the witness Wilkinson, and in the presence of the plaintiff's daughter who witnessed it there. That the plaintiff told him (Wilkinson) he (plaintiff) had been a soldier, and in looking at his signature when he signed it he laughed and said: 'I did not keep a straight line. It is uphill.' The witness Wilkinson remarked: 'Well, I guess you have charged up hill many a time when you were a soldier.' That just before witness left a gentleman came in who the plaintiff introduced as his son-in-law. That the plaintiff's daughter had been reading to him when the witness first saw him (Rec., p. 15). Mrs. Aten testified that she remembered something of the plaintiff going into his former soldier experiences when the statement was signed (Rec., p. 19).

The plaintiff further offered the testimony of five witnesses respecting his remarkable activity of mind and body prior to the accident (Rec., p. 10).

This was all the testimony that the plaintiff offered with respect to the happening of the accident. Of this testimony the learned trial justice spoke in his charge to the jury as follows (Rec., p. 23):

“There is no evidence in this case, and there is no allegation, as I understand it, in this case, which would permit you to say that the conductor, under the law, was compelled to stop the plaintiff in this case when he went out on the platform, and even stepped down on that step. There is no law which would compel the company, in the use of the highest degree of care, to know what the passenger was going to do—whether he was going to wait, when the car was going so slowly that it only went, as some say, twelve inches after the plaintiff was thrown, or whether he was going to get off. There is no law which would compel the conductor to know that that plaintiff was going to get off when the car was so near a stop. Therefore you have nothing to do with that phase of the case, because, as I have already said, *that is not the theory upon which the case has been tried. It has been tried upon the theory that the car had stopped, and whilst the plaintiff was in the act of getting off that car, it started. That is the theory upon which either the plaintiff is entitled to recover or the defendant is entitled to your verdict*” (Rec., p. 23).

It is thus seen that, however general the averments of the declaration, the only evidence which the plaintiff gave of negligence, and the only theory upon which the case was tried, was that the car had come to a dead stop, as the plaintiff himself expressed it; that thereupon the plaintiff rose from his seat, went down the aisle, upon the platform, turned to one side of the platform, then turned to the other, and got off as quickly as he could; and that while he was in the act of getting off as quickly as he could the car was negligently started and threw him.

The evidence on the part of the defendant can be summarized as follows:

Ethan Allen Heflin, motorman of the car in question, testified as follows (Rec., p. 15):

That the train consisted of two closed cars; that the east side of the car platforms was closed by an iron gate; that the train had just a very few passengers because the train which had left next ahead of his was late and took up the passengers; that witness stopped his car at 15th and New York avenue and waited there until the car ahead of him was just about leaving the transfer junction and then followed him into the junction; then stopped at 15th and G streets at the usual stopping place, without any jerk; there wasn't any necessity of being in a hurry as the train was on time; this was the first stop made after leaving New York avenue and 15th street. At 15th and G there is a stop-plate and witness's car was brought to a full stop there; that after waiting for bells and not getting any, witness looked back and saw the conductor was holding up an old man; didn't know anything had happened before that; from the time that witness stopped there he did not get bells to go ahead until after the conductor came out of the drug store; before the car had come to a stop had not looked through the door into the body of the car; didn't look back until after he didn't get bell; that when he looked back through the car the plaintiff was standing near the rear step of the motor-car. That when he first saw the old gentleman he was standing about two feet from the car immediately in line with the step of the motor-car; that the car was stopped with its fender right over the stop-plate that night; on the night of the accident the brakes had already been released (Rec., pp. 15 and 16).

Amos H. Whitacre, who was the conductor of the car in question, testified (Rec., pp. 16 to 19)—

that he was thirty-three years of age, and had been a conductor on the Capital Traction Company's

line for pretty nearly ten years; that the train was made up of two closed cars—motor and trailer; that there are gates on the left-hand side of the car platform which are always fastened; that there were five passengers on the train, including the gentleman that fell off; that as well as witness remembers, two ladies and two gentlemen were in the front car—the gentleman who fell was in the front car—and a colored woman in the rear car; that the two ladies in the front car left it while witness was with the plaintiff giving him what assistance he could; that he had been unable to find either of these ladies. The gentleman who fell was near the front of the motor-car, on the left-hand side. He (witness) was standing on the front of the trailer at the time, and the old gentleman got up and walked off the car; he stepped down on the step and fell. The car was moving very slowly at the time. Witness went to his assistance as soon as he could, and wanted to take him over to the drug store and send him to the hospital. The witness and Officer Putnam formed a seat with their hands and took the plaintiff over to Thompson's drug store. The accident happened about 8.30 in the evening—it was on Sunday. The car stopped before coming around the curve at 15th 15th street and New York avenue. We always stop there before coming around. It did not stop again before he fell after leaving the curve; it did not stop any more until it stopped at the transfer junction. The car did not go more than twelve inches after he fell; only a very short distance. He was lying right opposite the step where he got off when witness helped him up. The colored woman was on the front of the trailer, standing close to witness. Witness was on the front platform of the trailer; did not give two bells for the car to start before he fell; the car had not come to a stop after it left 15th street and New York avenue before he fell; was not on the motor-car at the time. That when the plaintiff got out of the motor-car the witness was on the front of the

trailer, and did not give two bells for the car to start before the plaintiff fell (Rec., p. 17).

The witness further testified on cross-examination that he was on the front platform of the trailer when the old gentleman commenced to get up from his seat and saw him go down the aisle of the car; that there was nothing unusual about him. The colored woman was standing by the side of witness (Rec., p. 17). Witness knew the car that he was on was moving.

Thereupon the following questions were asked and answers given (Rec., pp. 18 and 19):

"Q. How were you facing, south or west or east or how? A. I judge I was facing the front of the car.

"Q. Do you not know as to that? A. Well, I can not say for sure, but I presume I was facing the front of the motor-car.

"Q. You saw the old gentleman get up from his seat? A. I saw the old man get up from his seat but I did not have my eyes glued right on him all the time.

"Q. How soon after he had arisen from his seat did you take your eyes off him? A. I don't remember. I didn't pay any more attention to him than to any other passenger getting off the car.

"Q. Did you have your eyes on him as he passed through the doorway? A. I did; when he came out on the platform.

"Q. And you were looking directly south? A. I was looking south; yes, sir.

"Q. As he started to go west he wanted to alight from the car, did he not? A. He did.

"Q. He had obtained a transfer from you, had he not? A. He got a transfer.

"Q. You knew that? A. I knew that.

"Q. You knew his purpose? A. I did.

"Q. You saw the Washington and Georgetown car there, did you not? A. I did not; I did not notice it.

"Q. You did not notice it? A. No, sir.

"Q. You knew this car was moving—the car

you were on? A. Yes, sir; I knew the car was moving.

"Q. Why did you not tell the old gentleman not to get off that moving car? A. Because I did not know he was going to get off.

"Q. Did you not have your eyes on him? A. I did.

"Q. Could you not see him when he got from the platform down on the step? A. I did.

"Q. Why did you not say a word to him, not to get off that moving car? A. Because I did not know he was going to get off. How did I know he was going to get off? How did I know he was not going to wait until the car stopped?

"Q. What did you think he was going to do? A. I thought he was going to wait until the car stopped, and get off.

"Q. The car was going very slowly? A. The car was going very slowly.

"Q. And it would have been a very easy matter for you to have told him not to get off until it stopped? A. Yes, I guess it would. It would also be very easy for him to wait until it stopped. I didn't know he was going to get off.

Witness has not his rule book with him and does not recall Rule 130 by number, but when it is read to him says that it reads like this:

"'130. When not otherwise engaged on the company's business conductors must be on the platform and on the lookout for passengers who wish to take or leave the car. The car must never be started until all passengers are on or off, and conductors must try to prevent them from boarding or leaving the car while it is in motion.'

"Q. Why did you prevent this old gentleman from leaving a moving car? A. Why did I not prevent him?

"Q. Yes.

"The WITNESS: You mean why did I let him step off the car?

"Q. Yes. A. Because I didn't know he was going to step off. I told you that a while ago.

"Q. You saw him step down on the step? A. I did.

"Q. You saw him grasp the hand-rail there? A. He was standing on the step holding to the rail.

"Q. You saw him as he stepped down on the step and grasped that hand-rail? A. I did.

"Q. And you did not warn him that the car was moving because you did not know he was going to step off. A. I did not know but what he knew the car was moving. How did I know?

"Q. You supposed he was going to wait on this step until that car had actually come to a stop? A. I did, because the car had not moved further than that (indicating twelve inches) he was laying right opposite the back of the car where he fell—right opposite the step.

"Q. What threw Mr. Hutchinson from the car? A. He stepped off before the car stopped and it threw him.

"Q. Did you see this hold broken from the hand rail? A. I did not.

"Q. Were you not watching him then? A. Do you mean when he had hold of the hand-rail did I see it break loose? I presume I did.

"Q. Do you not know you did? A. No, sir; I don't know it—that I actually saw it. I saw him when he fell. I was looking at him. Sure I saw him when he fell.

"Q. And when you saw this old gentleman get up from his seat and come down and step from that platform down on the step you did not suppose he was going to step off? A. I did not. If I had I would have holloaed at him, or tried to have caught hold of him."

Augustus C. Putnam testified as follows (Rec., p. 14):

That at the time of the accident he was a crossing policeman at 15th and G streets, and had been on that crossing six years; that a 14th street car was going south on 15th street. There was a west-bound car, a Pennsylvania avenue car, just pulling out west. When this Avenue car pulled

out of the way the switchman called to witness that there was trouble. He either said that there was trouble or an accident, pointing towards the 14th street car. Witness ran over there and saw this old gentleman, who was then two-thirds of the way to the west curb and nearly opposite the rear platform of the motor-car; not over two feet north of it on a direct line from the step of the car to the west side. He seemed to be very feeble at the time. The conductor and witness carried him to Thompson's drug store, forming a chair with their hands. While in the drug store witness insisted on the old gentleman going to the hospital on account of his feeble condition. He said 'no,' he did not want to go; but witness saw he was in no condition to go by himself, and got one of the clerks to call the ambulance. While witness was waiting for the ambulance the old gentleman made the remark in the drug store that he thought the car had stopped, and that he stepped off before it stopped, and that it was his own fault, and he blamed no one. Witness when he went over to the car found it standing at the proper place. There is a stop-plate there, and it was standing at the stop-plate. It was standing with the fender over that stop-plate. There was a west-bound train that had gone; that it was the business of the witness as a crossing officer, when an accident occurred, to take in the situation of the car just where the car was, so that he could make a report of it, as he had to do at the station house (Rec., p. 14).

The witness, Arthur M. Loveday, testified (Rec., pp. 14 and 15)—

that he was a switchman in the employ of the defendant company at the time the accident happened; that a south-bound 14th street car came down to the junction, 15th and G streets, stopped, and while it was standing there a west-bound Avenue car came up; that witness pulled the switch to let the Avenue car through, when he

noticed the 14th street car still at a standstill; that witness afterwards saw that the 14th street car had stopped at the regular place for stopping. After the 14th street train had come to a full stop the west-bound Georgetown train came up. That witness walked down and looked between the rear end of the motor and the front end of the trailer to see what was the trouble, and saw the conductor holding up an elderly man; that he notified Officer Putnam, the crossing policeman, of the accident. That his duties are to switch all cars that the switch has to be pulled for, and to make a report of all accidents that happen. On cross-examination the witness testified that when he looked between the cars the old gentleman was standing right directly opposite the step on the rear of the motor-car—exactly opposite—with the conductor assisting him, and that he was about a step from the car. The 14th street car had stopped before witness pulled the switch for the west-bound car; the 14th street car got there first before the Avenue car, which was a Georgetown, and not an F and G car (Rec., pp. 14 and 15).

The witness, Louis V. Dieter, testified (Rec., p. 13)—

“that on the night the plaintiff was hurt the witness was employed in Thompson’s drug store; that the plaintiff was brought into the store by Officer Putnam; that they sat him in a chair in the front part of the store, and asked him whether he would be sent to the hospital. He said no, that he did not think he wanted to go to the hospital, but Officer Putnam told one of the clerks to call an ambulance. While they were calling the ambulance the old gentleman started to get up, and they tried to get him to sit down again, and at last got him to sit down. Some asked him whose fault it was, and he said that he thought it was his own fault, as far as witness remembers it. That the old gentleman was suffering a good deal at the time (Rec., p. 13).

The witness, Robert B. Dickey testified (Rec., pp. 11 and 12)—

that at the time of the happening of the accident he was a United States mail clerk living at Harper's Ferry, and was a passenger on the same car with the plaintiff when he was hurt; that he boarded the car at U street going south; that the train was composed of two cars, one of which, the forward car in which he took his seat, was a closed car; that it was about half-past eight o'clock when the accident happened as he was returning to his home at Harper's Ferry and was anxious to catch the train that left the Union Station at 9.10 p. m.; that the car stopped at 15th and G streets, and witness was sitting on the right-hand side of the car in the rear end, while the gentleman who was hurt was sitting in the front end on the opposite side; there were two other passengers in the car—two ladies—doesn't know what became of them; but they had left the car when it started again after the accident; that just before the car came to a stop the gentleman who was hurt got up and walked to the end of the car—not the end where he was sitting, but the end where witness was sitting—and went out the door between the two cars; the car was moving when he was walking through the car, but witness was unable to say whether it had stopped when he got out on the platform and stepped off. That witness knows nothing about. Witness could hardly estimate the speed of the car; it was just simply moving along slowly. The conductor was on the other car, or between the two cars—one or the other—he was not in the car witness was in. Witness was anxious to hurry and catch his train and became a little uneasy at the delay, and got up to see what the trouble was, as they were not moving, and found the conductor assisting this gentleman up on his feet right at the steps of the car.

“‘Q. Had that car started after it stopped, before that?

“‘A. Oh, no; no, because I was very anxious for it to start.’

Can not remember whether the conductor rung two bells; doesn't know; old gentleman was down in a very stooping position, partly up, with the conductor raising him. He was just opposite the steps of the car, where I suppose he stepped off, just the same as if he stepped right off the steps, and was right down by the steps. The conductor managed to get him across the street on the right-hand side, and then a policeman assisted the conductor and they carried him directly opposite again over to a drug store.

On cross-examination the following questions were asked and answers given (Rec., p. 12):

“Q. Did you notice the car jerking, Mr. Dickey, as it passed over the cut-outs just above where it stopped? A. I didn't notice any irregularity in the car at all.

The car did not go on until after the accident was over, and the old gentleman was taken to the drug store and the conductor returned and asked witness for his name; did not notice a Georgetown car abreast of the one on which witness was riding.

“Q. You paid no attention to that? A. I paid no attention to any other car. My anxiety was to get over to the station.

“Q. Indeed you paid practically no attention to anything until you knew there was some trouble, did you, Mr. Dickey? A. My reason for going out was to find out whether they were going to start soon or not; otherwise I would have tried to make some other arrangements. I had to get to the station and when I stepped out of the car I found this gentleman as I have just stated and the conductor assisting him to his feet. I offered to assist him up.

“Q. And you paid no attention to what was going on until after this accident happened and

then you went out to see what the trouble was about as you were anxious to get to the station?
A. Yes, sir."

Susie Lee, the colored woman referred to, testified as follows (Rec., pp. 12 and 13):

That she cooked, washed, and ironed for W. V. Cox at Brightwood, and was a passenger on the same train with the gentleman who was hurt.

"What I recollect about the accident is, as I was getting up to go off of the trailer, the front door of the trailer, I saw an old gentleman falling from the step of the front car; and he had fallen to the ground before the car stopped; and the conductor rushed off the car and picked him up; picked him up before the car stopped; and after the car stopped I got off."

Witness was going to 21st street and was going to transfer there at Thompson's drug store to the F and G street car; was in the trailer car—about midway of the trailer—and when she got up the car was moving; that as she walked to the front of the trailer and got out on the platform the car was still moving; that when she got out on the front platform of the trailer, the first one she saw was the old gentleman falling to the street; 'he was falling when I first saw him; he was falling from the platform of the front car—the rear platform of the front car—it seemed as if his hand had given way and he lost his holt—his hand-holt; did not see him when he came out of the front car to get on the platform.'

"Q. How soon after he had fallen off did the car come to a stop? A. Well, it was about a foot from him when it stopped, slowly stopping. I guess about a foot and a half from him when it stopped. Witness got off the car then, and the conductor asked her for her name and address which she gave. The conductor was assisting the old gentleman; he had jumped off the car and went towards the old gentleman who was lying towards the Treasury Department, with his head

towards the Treasury Department. That is the way he fell. His body as it lay there passed by the witness as she stood on the platform of the car; saw the conductor rush off the car; he jumped from the trailer—the front platform of the trailer-car. After witness had gotten off, she went right around the back of the car and got the F and G car. The old gentleman looked very feeble to me; he looked to be quite an old gentleman—very feeble.

On cross-examination the witness further testified that the conductor was standing on the front platform of the trailer-car while she was sitting down in the car; that she had arisen from her seat and had walked to the door of the car which was open, to change cars; did not see the old gentleman come out of the forward car, the motor-car; he was on the step falling from the step when she first saw him.

“Q. Which was the one (arm) that had been broken from the stanchion? A. This one (indicating the left arm).”

Did not notice any jerking of the car as it passed over the cut-out just about as it passed the corner; the car slowed around very gently, and stopped very gently; did not notice any jerking at all; the conductor was standing right on the front platform of the trailer car. The car had not quite stopped when witness got to the door of the trailer-car, but it was going very slowly.

On redirect examination the witness further testified as follows:

“Q. How long after the old gentleman fell off was it before the car came to a full stop? A. Well, the car was slowing down down. I suppose—well, then the gentleman fell off, the front car, by the time the car stopped, it was about a foot and a half from the old gentleman; so you can judge for yourself how long it was. It then came to a full stop and I got off.

“Q. What was the last stop it made, if you recollect, before the old gentleman fell off? A. I don't

remember anything about any stop at all. I was just looking out and seeing the people and different things. I wasn't paying any attention to the car whatever."

No witness puts the distance the car went after the plaintiff fell at more than two feet.

This was all of the oral testimony in the case.

III.

Instructions to the Jury by the Court.

It will simplify matters to consider the defendant's instructions before referring to those of the plaintiff.

Defendant's first prayer:

"The jury are instructed that in the case at bar no presumption of negligence arises from the mere happening of the accident in question.

This prayer was conceded by the plaintiff's counsel (Rec., p. 21).

Defendant's second prayer:

"The jury are instructed that the burden is upon the plaintiff to prove to the jury by a preponderance of the evidence that the accident in question was due to the negligence of the defendant and that said negligence was the proximate cause of the plaintiff's injury."

This prayer also was conceded by the plaintiff's counsel (Rec., pp. 21 and 22).

Defendant's third prayer:

"The jury are instructed, as a matter of law, that in order for the plaintiff to recover in this action against the defendant he must prove by a preponderance of the evidence that on the occasion in question the defendant's car came to a stop, and that while the plaintiff was endeavoring to alight therefrom it started forward and threw him."

This prayer was granted by the court over the objection of the plaintiff and was duly excepted to.

The plaintiff asked the following instructions:

Plaintiff's first prayer:

"You are instructed that the defendant street railway company was bound to exercise the highest degree of care and skill practicable under all the circumstances in this case in caring for plaintiff's safety while a passenger on one of its cars; and if you believe that the plaintiff was injured whilst such passenger, because of the failure on the part of the defendant company to exercise such care and skill, then the plaintiff is entitled to recover in this action."

(Rejected. Exception.)

Plaintiff's second prayer:

"You are instructed that the defendant street railway company is required to do all that human care, vigilance and foresight can reasonably do, consistent with its mode of conveyance and the practicable prosecution of its business to prevent accident to its passengers when alighting from its cars; if, therefore, you find in this case that plaintiff was a passenger on one of defendant company's cars, and was about to alight therefrom at the regular transfer station at 15th and G streets, Northwest, and further find from all the facts and circumstances in the case that said defendant company, through its motorman or conductor, or both, knew, or could have known of said plaintiff's intention to alight at this point, and yet failed to exercise the care and vigilance that the occasion demanded to see that said plaintiff alighted in safety, your verdict should be for the plaintiff."

(Rejected. Exception.)

Plaintiff's third prayer:

"Even though you should find that the jerk which precipitated plaintiff to the street was caused by his foot coming in contact with the surface of the street in his endeavor to alight

from the car, which was in motion at the time, and not by reason of any sudden jerk or movement of the car; yet, if you further find from all the facts and circumstances in the case that the plaintiff *reasonably* supposed the car to be at rest, and perfectly safe for him to alight from, and the conductor knowing that he was about to alight from this moving car, gave the plaintiff no warning that the car was still moving, or that it was unsafe for plaintiff to attempt to alight therefrom and that by reason of this negligence plaintiff was injured, your verdict should be for the plaintiff."

(Rejected. Exception.)

Plaintiff's fourth prayer:

"You are instructed that as plaintiff was injured when a passenger of said defendant street railway company, it is necessary for said company, in order to escape liability for injuring him, to show you from all the facts and circumstances in the case, and by a preponderance of the evidence, that not only was plaintiff himself negligent, but further that his said negligence directly and efficiently contributed to the production of the injury."

(Rejected. Exception.)

Plaintiff's fifth prayer:

"You are instructed that if you find from the evidence that the plaintiff, soon after he was hurt, made statements in relation thereto at variance with his testimony given in this case, and you further find that at the time of making the former statements he was suffering shock and pain, you are to look at the difference in the statements from the point of view of his condition when making each, and to consider what effect the shock and pain from which he was suffering, if he was so suffering when he made the former statements, might have had on his ability to correctly ascribe the true cause of the accident."

(Granted. Exception.)

Thereupon the court charged the jury as follows (Rec., pp. 22, 23, 24, and 25):

The COURT (Mr. Chief Justice CLABUAGH): "Now, gentlemen, the facts in this case, to my mind, are very simple; and the law is just as simple. The plaintiff charges and has offered evidence tending to show that he was a passenger on the car in question, and that it stopped at the place of transfer on 15th street near G street; that he waited until it had stopped, and then arose from his seat in the car, passed the conductor in the car, walked out on the platform, and down on the step, and as he had his foot in the air, to place it upon the ground, the car suddenly started and threw him, whereby he was injured. That is the plaintiff's case, as he contends.

"The law puts upon the plaintiff the burden of proving those facts by the fair weight of the testimony. That is called the preponderance of the proof, which means the fair weight of the proof, as I have explained to you so many times.

"Now, if you find those facts from the testimony in this case, the plaintiff is entitled to recover in this case. You have heard in the discussion here (with which, however, you have no concern—the discussion before the court) a great deal said about the highest degree of care that must be exercised by a railroad company in respect to its passengers. Now, it is true that they must use the highest degree of care for the safety of their passengers. Every railroad company has that duty laid upon it. But that rule of law must be applied to the facts in each case. The only question in this case is: Did the plaintiff get off that car whilst it was standing still, and, whilst he was in the act of getting off, was the car started and was he thereby injured?

"Those conditions require the highest degree of care, to wit, that the defendant company must use the highest degree of care not to start its train until a passenger has alighted. In that respect in this case the highest degree of care must

be exercised by the defendant in this case; and therefore it follows, of course, that if the defendant did not use that care, but started the train (having stopped it, and the plaintiff being in the act of getting off) before he did get off, and threw him, then they were not using the degree of care which the law says they must use, and he would be entitled to recover. That is the plaintiff's side of this case.

"Now, on the other hand, if the defendant company in this case stopped its car, but before it did stop the plaintiff in this case got off and by reason of his getting off whilst the car was in motion he was injured, then he is not entitled to recover in this case, and your verdict must be for the defendant.

"It is a perfectly plain, simple question of fact, and of law. There is no difficulty about understanding either of these things; so that there ought not to be any trouble for you to understand what the law is; and I am sure there will not be, any more than there ought to be any difficulty in finding the facts in this case.

"That being so, it is essential, by reason of the misunderstanding on the part of counsel for the plaintiff of what the court intended to say, and as it understands it, did say, that I should say this: There is no evidence in this case, and there is no allegation, as I understand it, in this case, which would permit you to say that the conductor, under the law, was compelled to stop the plaintiff in this case when he went out on the platform, and even stepped down on that step. There is no law which would compel the company, in the use of the highest degree of care, to know what the passenger was going to do—whether he was going to wait, when the car was going so slowly that it only went, as some say, twelve inches after the plaintiff was thrown, or whether he was going to get off. There is no law which would compel the conductor to know that that plaintiff was going to get off when the car was so near

a stop. Therefore you have nothing to do with that phase of the case, because, as I have already said, that is not the theory upon which the case has been tried. It has been tried upon the theory that the car had stopped, and, whilst the plaintiff was in the act of getting off that car, it started. That is the theory upon which either the plaintiff is entitled to recover or the defendant is entitled to your verdict.

"I have said that simply because there was some misunderstanding on the part of counsel for the plaintiff of what the court had intended to say. I permitted him to discuss it merely because I thought perhaps there might be some effort to attack the credibility of the conductor in this case, because he did not stop the plaintiff before he got off. That was the only theory upon which I permitted counsel to discuss it at all.

"I want to advise you here that you are trying the facts in this case, gentlemen, and not in any other case; and it is not proper for counsel in this case or in any other case to appeal to juries or jurors as to what conclusion they may have arrived at in the trial of other cases. In other words, it is not competent, in my judgment, for counsel to say to a jury: 'From your service in other cases you must recognize the fact that the company's employees sustain each other in every case they testify in.'

"In the first place, there is no law for such a statement. In the second place, there is no fact in such a statement, and you must not be governed by it. An employee is entitled to be believed or disbelieved just as you would believe or disbelieve any other witness in a case—just as you would a plaintiff in a case. I say this to put you upon your caution that statements of that character, while made by counsel without meaning to do anything in violation of the rights and duties of counsel, are not to be regarded by you. You can not judge one employee by a statement that in other cases you may have found that one employee sustained other employees in the same case.

"You are to be governed in this case by the law and facts of this case. You are to have no consideration of sympathy in this case. It is true this plaintiff has been seriously injured; but that does not concern you in any degree whatever unless you first find that his injury was caused by the fault, the negligence, of the defendant company. When you have found that his injury was caused by the fault or negligence of the defendant company, then you must proceed farther and ascertain what those injuries are—how much he has suffered, and so on.

"I have been asked to read to you this prayer:

"'You are instructed that if you find from the evidence that the plaintiff, soon after he was hurt, made statements in relation thereto at variance with his testimony given in this case, and you further find that at the time of making the former statements he was suffering shock and pain, you are to look at the difference in the statements from the point of view of his condition when making each, and to consider what effect the shock and pain from which he was suffering, if he was so suffering when he made the former statements, might have had on his ability to correctly ascribe the true cause of the accident.'

"Which simply means with respect to the statement in question here, the statement which he gave to the railroad company's representative. If you find (as, of course, you must) that there is a wide difference between the statement made by the plaintiff on the stand and the one alleged to have been made by him when he was at the hospital, in considering the difference in those statements you have the right to consider the condition under which each was made, and to conclude whether or not the condition of bodily suffering and pain, if it existed at the time, had any influence upon the statement he made at that time, as explaining why there should be a difference between the statement made at the hospital and the statements made upon the stand.

"Those are things that you have a right to consider, and it is for you to determine whether they are sufficient to explain away the difference in the statements made at the two different times. That is what that means, as I understand it.

"Nor are you to infer that there was any negligence on the part of the defendant company by reason of the accident in this case. The negligence has to be proved, as any other negligence charged.

"You are instructed that the burden is upon the plaintiff to prove to the jury by a preponderance of the evidence that the accident in question was due to the negligence of the defendant, and that said negligence was the proximate cause of the plaintiff's injury.

"You are instructed, as matter of law, that in order for the plaintiff to recover in this action against the defendant, he must prove by a preponderance of the evidence that on the occasion in question the defendant's car came to a stop, and that while the plaintiff was endeavoring to alight therefrom it started forward and threw him.

"Now, gentlemen, I have tried to say to you what I have said in plain, distinct language, without the use of any legal terms or anything else except just such language as we talk when we meet each other. So you understand exactly what the law in this case is, and you have heard the evidence.

"Therefore, if you find from the evidence in this case that the plaintiff has proved by the fair weight of the testimony that his accident was caused by the defendant company, then you must go one step farther. Of course he would then be entitled to recover, and you must go one step farther and say how much he is entitled to recover."

The only exception taken by plaintiff's counsel to the

charge of the court is contained on page 25 of the record, and is as follows:

"Mr. MATHER: I wish to except to so much of your Honor's charge as restricts the plaintiff to the one theory of this case, and eliminates as a factor in the case whatever of negligence the jury may have found on the part of the defendant in not stopping, or in not saying anything to the plaintiff as he was about to alight from this moving car. I also wish to except to so much of your Honor's charge as relates to the burden of proof. There was no mention made of the burden shifting to the defendant to show contributory negligence on the part of the plaintiff. Then I also wish to note an exception to so much of your Honor's charge as covers the defendant's third prayer."

ARGUMENT.

Counsel will take up at the outset the only proposition which it is thought counsel for the appellant will argue, which is the following:

A.

Has the Doctrine of the Last Clear Chance Any Application to the Case at Bar?

Care must be taken to avoid confusion of thought in this connection. The duty of a common carrier to its passengers is enforced by severe rules. While common carriers are not insurers of the safety of their passengers, nevertheless they are obliged to use the highest measure of care towards them. We are now considering, not the case in which the carrier owed a contract duty to its passengers as such, but in which for the sake of humanity one person having an opportunity to avoid in-

juring another person who has been negligent fails to use reasonable care to avoid the consequences of that negligence, and accordingly injures that other person. The very invocation of the rule of the "last clear chance" admits that the plaintiff was guilty of contributory negligence on the occasion in question. Consequently, he could no longer claim from the carrier the rigid rule of care which was due to him before he had deliberately placed himself in a dangerous position. The only measure of care is that ordinary conduct which would be required from the ordinarily prudent man in the condition assumed by the doctrine of "last clear chance."

The very statement of this doctrine as applicable to such cases as that at bar is misleading. It has been ruled repeatedly that it is not negligence in law for a passenger to leave his seat in a car while the car is moving, and to take a position on the platform preparatory to alighting. The conductor in such case has no right to interfere with the passenger. In the case at bar the testimony of the conductor shows (Rec., pp. 18-19) that he had no idea that the plaintiff intended to get off the car until it stopped. Plaintiff's counsel asked the conductor the following:

"Q. Why did you not say a word to him, not to get off that moving car?"

To which the conductor answered:

"A. Because I did not know he was going to get off. How did I know he was going to get off? How did I know he was not going to wait until the car stopped?"

"Q. What did you think he was going to do?"

"A. I thought he was going to wait until the car stopped and get off.

"Q. And it would have been a very easy matter for you to have told him not to get off until it stopped?

"A. Yes, I guess it would. It would also be very easy for him to wait until it stopped. I didn't know he was going to get off."

Upon this point the court said in its charge to the jury (Rec., p. 23) as follows:

"There is no evidence in this case, and there is no allegation, as I understand it, in this case, which would permit you (the jury) to say that the conductor, under the law, was compelled to stop the plaintiff in this case when he went out on the platform, and even stepped down on that step. There is no law which would compel the company, in the use of the highest degree of care, to know what the passenger was going to do—whether he was going to wait, when the car was going so slowly that it only went, as some say, twelve inches after the plaintiff was thrown, or whether he was going to get off. There is no law which would compel the conductor to know that that plaintiff was going to get off when the car was so near a stop. Therefore you have nothing to do with that phase of the case, because, as I have already said, that is not the theory upon which the case has been tried. It has been tried upon the theory that the car had stopped, and, whilst the plaintiff was in the act of getting off that car, it started. That is the theory upon which either the plaintiff is entitled to recover or the defendant is entitled to your verdict.

"I have said that simply because there was some misunderstanding on the part of counsel for the plaintiff of what the court had intended to say. I permitted him to discuss it merely because I thought perhaps there might be some effort to attack the credibility of the conductor in this case, because he did not stop the plaintiff before he got off. That was the only theory upon which I permitted counsel to discuss it at all."

The Doctrine of the Last Clear Chance Never Applies to Cases of Concurring Negligence.

This doctrine never applies to a result which is brought about by the negligence of the two persons directly concerned in it, which negligence is persisted in by each of them up to the moment of the disastrous result, although each of them could have prevented the result by desisting from said continued action.

The case of *Shareman, respondent, vs. St. Louis Transit Company*, decided in the year 1903 by the Court of Appeals of the State of Missouri and reported in 103 Missouri Appeal Reports, page 515, is directly in point. In this case the plaintiff endeavored to recover under either of inconsistent and mistaken theories. In that case there was a city ordinance which provided that "conductors shall not allow ladies and children to enter or leave cars while in motion."

Of this ordinance the court said (p. 529):

"Whatever force may be allowed to the city ordinance in question, it can not abrogate the rule of law that when the negligence of a party proximately and directly causes or contributes toward causing injury to him, he has no just claim for damages from another individual whose negligence also played some part in the affair. *Moore vs. Railroad*, 75 S. W., 672; *Hudson vs. Railroad*, 101 Mo., 13; *Corcoran vs. Railroad*, 105 Id., 399; *Weller vs. Railroad*, 120 Mo., 635; *Duncan vs. Railroad*, 46 Mo. App., 198. The scope of the last chance doctrine is to be found in the adjudicated precedents, which have already encroached on the doctrine of contributory negligence to the extent of constituting an exception to that doctrine as applied in some cases."

The court also say (p. 525):

"In our opinion this cause was submitted to the jury on mistaken and inconsistent theories of the

law. The second instruction given for the plaintiff laid down the proposition that under the ordinance read in evidence it was the conductor's duty to exercise ordinary care to prevent the car from being in motion while the plaintiff's wife was alighting, and the same degree of care not to permit her to alight while it was in motion; whereas the first instruction given for plaintiff and the appendix attached to one asked by the defendant, required the conductor to exercise high care to prevent her from leaving the car while it was moving, and in effect, charged that unless he did, plaintiff ought to have a verdict. Those two instructions are in conflict as to the care required of the conductor. There is no proof that Mrs. Shareman started to leave the car while it was in slow motion and was thrown off by an acceleration of its speed. The evidence countenances only two theories of the casualty. One arises on the testimony of the plaintiff, and is that after the car had stopped, and while Mrs. Shareman was in the act of getting off, it was suddenly and carelessly started, she being thereby thrown on the street and hurt. That makes a clear case of liability against the defendant, if she herself was exercising due care; and there was nothing in the testimony of the witnesses to attach fault to her if those were the facts. It was the duty of the carmen not only to stop the car, but to hold it quiet long enough for her to alight safely, by using ordinary activity and caution. *Strauss vs. Railroad*, 75 Mo., 185; *Hurt vs. Railroad*, 94 *Id.*, 255.

"The other theory of the case arises on the testimony for the defendant. It is that after the car had stopped a sufficient interval for all passengers to alight who desired to do so, and had then started again, plaintiff's wife suddenly arose from her seat, walked to the middle door of the car, and without ringing for a stop, stepped off and was thrown down; but not by a sudden increase of speed. *If she did that, she and nobody else*

was to blame for the accident. For aught the evidence shows to the contrary, she was a woman of full physical and mental capacity and, therefore, of full legal responsibility. If the defendant's servants owed her high care to prevent injury to her, she owed herself ordinary care to avoid injury. If she deliberately left the car while it was moving fast enough to make the act dangerous, her conduct was negligent and bars recovery. In that event the case differs essentially from one where a passenger is hurried in his exit by the failure of the car either to stop, or stop long enough, at his destination for him to get off safely by reasonable diligence. He is then, in a manner, forced to take a risk and, if hurt, will not be denied redress unless the risk taken is one which a man of common prudence would shun. *Kelly vs. Railroad*, 70 Mo., 602.

"This car had already made a customary and reasonable pause to discharge passengers and had started onward, if the testimony for the defendant is true; as, for the purpose of this hypothesis we assume it to be. There was, therefore, no invitation, express or implied, to Mrs. Shareman to alight, nor any constraint on her to do so. If she attempted to alight while the car was moving away from its usual stopping place, the act was purely voluntary and she must abide the consequences.

"In *Neville vs. Railroad*, 158 Mo., 293, it was said that if the plaintiff's son was killed while getting off a moving train, without direction or invitation of the defendant railway company, or its servants, plaintiff had no case, as the deceased took the risk incident to such an act.

"In *Mason vs. Railway*, 75 Mo. App., 1, which was an action for damages based on the ground that a railway train was not held long enough at a station to permit the plaintiff to alight safely, the plaintiff testified that he stepped on the station platform while the train was moving. Concerning this testimony, it was said that if he

selected the time when and the place where to alight, he would be held to a greater degree of care and to have assumed more of the responsibility of the situation than if the conductor was present and gave him a direction to alight; that having selected his own time, the law will hold him to the exercise of due care in making the choice, in view of the environment and other circumstances which induced him to jump from the moving train.

"In *Jackson vs. Railroad*, 118 Mo., 199, plaintiff, a woman, had been injured in leaving a street-car, and sued for damages. Her testimony, like that for the present plaintiff, was that while she was stepping from a still car it was started and threw her off. The testimony for the company was that she stepped from the car while it was moving and after it had left its stopping place. This instruction was given in behalf of the defendant:

"'If the plaintiff undertook to alight from the defendant's car while it was moving, then defendant could not have been guilty of any negligence charged and your verdict must be for the defendant.'

"The negligence charged in the petition was that the car started while she was in the act of getting off. Said instruction was attacked as erroneous, but was approved by the Supreme Court. That case throws much light on the true issues of the present case and should be carefully studied. The instructions given by the trial court were held to embody the only theories which properly arose on the evidence therein, namely, whether the car stopped and was suddenly started while Mrs. Jackson was alighting, or whether she attempted to alight while it was in motion. *It will be seen by reading the opinion that the Supreme Court insisted on holding the plaintiff fully accountable for her voluntary acts, instead of attaching blame to the conductor if he failed to intercept her, though he could have done so;*

which the instructions submitted by the plaintiff insisted was so far his duty, that the railway company was liable if he neglected to intercept her. Defendant's counsel in the present case contended for doctrines approved in the Jackson case, and submitted instructions which enunciated them; but the trial court refused those instructions.

"It is not necessarily a negligent act to leave a moving car; but a question of fact arises for the jury as to whether the act was negligent; and if it was and proximately contributed to an injury received by the passenger, he has no case for damages.

"The facts shown by the record did not call for an application of the last chance rule, but the court applied it by the clause attached to an instruction requested by the defendant. Said instruction, as requested, was that if the car stopped to let off passengers and started forward, and after it had started and was moving away, plaintiff's wife attempted to alight and was thrown down and injured, he could not recover. That charge was precisely like one approved in the Jackson case, supra. The qualification added by the court was, in effect, that plaintiff could not recover unless the jury found from the evidence the conductor, by the exercise of a high degree of care, could have prevented plaintiff's wife from leaving the car. The last chance rule, so far as we know, has never been held to make a defendant liable unless he could have avoided injuring a negligent plaintiff, after he knew, or might have known, the plaintiff was in danger from what he (the defendant) was doing—has never been applied to make a passive defendant liable because he could have prevented a plaintiff of full capacity, from injuring himself. But this was what the instructions in this case did. Granting that the conductor could have hindered her from getting off (and the evidence to maintain

that premise is weak) she, herself, by the hypothesis of the requested instruction and by the testimony for the defendant, was a voluntary and active agent in bringing on the accident until the very instant of her fall. She stepped from the moving car with her eyes open, with every means to know the risk she took, with nothing done by the defendant's servants to distract her attention or mislead her, and with no sudden peril to confuse her. Therefore her own conduct was the proximate and sole cause of the harmful consequence. This case is, as to the point in hand, identical with Weber vs. Railroad, 100 Mo., 194, in which the law was declared as we have stated it. Carroll vs. Transit Co., 107 Mo., 653, is also apposite, as are secs. 185, 186, and citations in 1 Thompson, Negligence. A person who is as conscious of the danger to which he is exposed as is another person, is at least as much bound to try to shun danger, instead of going forward to meet it, as the other party is to try to avert it; otherwise defendants only are liable for negligent acts. Moore vs. Railroad, 75 S. W., 672; Cooley, Torts (2 ed.), 812."

The case of *Armstrong vs. Portland Railway Company* 52 Oregon, 437, is in all essential respects identical with the case at bar.

The complaint alleges that the plaintiff was a passenger on a trolley-car in the city of Portland and was notified by the conductor that the car had reached her street; that she was led to believe that the car had stopped, and left her seat and passed upon the platform, where the conductor was standing with his hand on the bell-rope; that the night was dark, and, believing the car had stopped, she attempted to alight, and was thrown to the ground; that the conductor was standing near her, knew that she was about to alight, and permitted her to alight without warning, and permitted the car to move forward while she was in the act of alighting although he could have prevented the same.

The testimony of the plaintiff showed that she did not know positively whether the car had stopped at the time she attempted to alight, but that the conductor was standing in the vestibule at the rear of the car, which was the place from which the plaintiff attempted to alight to the street.

The defendant gave in evidence the testimony of the conductor and two passengers, who swore positively that the plaintiff got off the car before it came to a stop. The conductor testified that at about the time he gave the signal to stop for Ninth street the plaintiff arose from her seat, walked to the back of the car, and stepped off just as the car was coming to a stop and while it was still in motion; that he did not think for a moment she was going to step off until the car stopped, but she did.

One of the other witnesses testified that after the car had slowed to about a mile an hour and was within three or four feet of the crossing and still in motion the plaintiff stepped off. The other witness testified that the car was in about four feet of the crossing and was moving slowly when the plaintiff stepped off.

Upon this testimony the court held that (p. 443):

"It clearly and undisputably shows that there was no negligence on the part of the defendant and that plaintiff was injured because she attempted to alight from a moving car without necessity or seeming necessity for so doing and that she was not advised or requested to do so by its servants. This was negligence of such an obvious character that the court was justified in directing a verdict against her."

The court in its opinion, at page 443, further says:

"It is argued, however, that defendant is liable because the conductor did not notify plaintiff that the car was still in motion and warn her against the danger of her contemplated act; but the evidence does not show that the conductor knew, or

had any reason to believe that she was intending to get off the car until it had stopped."

"Plaintiff was of mature years and in possession of all her faculties, and we are not advised of any rule of law making it negligence for the conductor of a street-car, under such circumstances, to warn such a person of the danger to be apprehended in alighting from a moving car. The facts do not bring the case within the rule announced in *Smitson vs. Southern Pac. Ry. Co.*, 37 Oregon 74 (60. Pac., 907). There the injured party was a passenger on a steam railway. As the train approached her destination it stopped, and she was notified by one of the company's servants to alight, but, as she was in the act of doing so the train suddenly started, injuring her. The facts, therefore, are entirely different from those shown in the present case. Here there was no invitation or request to plaintiff, from any employee or agent of defendant, to alight from the car, and they had no reason for supposing or believing that she would attempt to do so, while the car was in motion. There is, therefore, no ground upon which the defendant can be charged with negligence by reason of the failure of the conductor to notify plaintiff that the car was still in motion, or that she was liable to be injured if she attempted to alight before it stopped.

"Nor is this a case where negligence can be implied from the mere fact of the accident. Actions of this kind are not exceptions to the general rule that the burden of proof is on the plaintiff to prove negligence, when it is denied by the defendant. There is a class of cases in which negligence may be presumed from the relation of the parties and the manner of the accident. *Booth, Street Railways*, sec. 361; *Goss vs. Northern Pac. R. R. Co.*, 48 Oregon, 439 (87 Pac., 149); *Chicago City Ry. Co. vs. Catlin*, 70 Ill. App., 97; *Bradley vs. Railway Co.*, 94 Mich., 35 (53 N. W., 915). But this is not one of them."

The case of *Allen vs. St. Louis Transit Co.*, decided in

1904, by the Supreme Court of Missouri and reported in 183 Mo., 411, was one in which the plaintiff boarded the grip-car of an east-bound train to be carried down town to his place of business. He got on the running-board on the south side of the car; seeing a vacant seat on the other side which he desired to take, he walked along the running-board to the front platform, crossed the platform and, taking hold of a stanchion with his left hand and of the hand-hold of the dash-board with his right, stepped down on the running-board on the north side, then, letting go the hold of his right hand, turned his body to the west, aiming to catch the next stanchion with that hand. While in that act he was struck by a west-bound car, knocked off and received very severe injuries. The suit was to recover damages for those injuries (p. 422).

At the request of the defendant, the trial court gave the following instructions in its favor (p. 429):

"7. There was no duty devolved on either the gripman or the conductor to prevent the plaintiff going on the inner footboard, and their failure to do so was not negligence.

"8. The defendants were under no duty to erect bars or other obstructions to prevent persons old enough and intelligent enough to take care of themselves from going on the inner footboard while the car was under way, and a failure to do so was not negligence.

"10. If the gripman on the west-bound car saw the plaintiff on the front platform, and his actions were such as to indicate that he was going to remain there or not step down until the cars passed each other, and if he did not in fact step down on the footboard until the front end of the car had passed or was passing him, and it was then too late for the gripman to give warning or stop the car, the gripman was not guilty of negligence.

"11. Although the gripman of the car on which the plaintiff was, saw him on the front platform,

yet if the conditions were such that by looking or listening he could have seen or heard the approaching train, the gripman had a right to assume that he would see or hear it and would not go on the footboard until the danger had passed; and if after he did step down on the footboard it was too late for the gripman to stop the car, he was not guilty of negligence."

These instructions were quoted in full by the court, which said (p. 432):

"If the jury had given obedience to those instructions they could not have rendered a verdict for the plaintiff."

The judgment below in favor of the plaintiff was reversed and a new trial was ordered.

In the case of *Witherington, administratrix, vs. Lynn & Boston R. R. Co.*, decided in 1903 and reported in 182 Mass., page 596, the accident occurred at about 8 o'clock p. m., August 8, 1899, and it was getting towards dark. The evidence tended to show that while the car was moving at the rate of sixteen miles an hour and was running smoothly the conductor asked plaintiff's intestate for the fare, and that thereupon the latter arose and, standing near the edge of the side of the car, put his hand in his right-hand trousers' pocket as if to get his money, and while doing this he leaned a little to the left and backwards, and his body left the car, striking the ground with such force as to cause fatal injury. The plaintiff contends that the gross negligence consisted in allowing the car to go at an unusual or dangerous rate of speed, or in not warning the deceased of the danger. The court say (p. 597):

"We are of opinion that the evidence was not sufficient to warrant a finding of gross negligence in either respect, and that a verdict for the defendant was properly ordered. This is not a case

where the speed was so great as to result in any unusual motion or jar of the car. The track, although slightly curved, was very nearly straight, and the car was running smoothly. It can not be said that if there was negligence on the part of the motorman it was such as would come under any reasonable definition of gross negligence. *Galbraith vs. West End Street Ry.*, 165 Mass., 572. *And the same may be said of the failure of the conductor to tell the man to sit down or to warn him of the danger of standing so near to the edge of a moving car. So far as respects the obvious danger to one standing in that position, the conductor may reasonably have supposed that the deceased needed no warning, but would look out for himself, during the brief time required to get from his pocket the money for the fare."*

In the recent case of *Jaquette vs. Capital Traction Company*, 34 App. D. C., 41, the record showed that the plaintiff was tripped by a fender on a street-car of the defendant company, after he had signalled the motorman to hold the car for him to board it. The evidence tended to prove the motorman was holding the car for him, and looking at him when he started to go around the front of the car and tripped. Among other grounds it was sought to hold the defendant liable because the motorman did not warn the plaintiff, as he neared the fender, of his danger. This court, however, affirmed the judgment of the trial court entered upon a verdict directed for the defendant, holding in its opinion (p. 47) that the plaintiff was guilty of the grossest carelessness, and that the defendant was not chargeable with any neglect of duty in the management of the car.

Brief consideration of the cases of Metropolitan R. R. Co. vs. Snashall, 3 App. D. C., 420, and *Georgetown & Tenallytown Ry. Co. vs. Smith*, 25 App. D. C., 259.

In the former case, a woman passenger was not a resident of this city, but had come here to attend a church convention. Upon her arrival at the railroad station she took the car from which she was thrown.

"The car had stopped as usual in front of the depot to receive passengers. There was quite a crowd, and the car was soon filled. The car had started with some of Mrs. Snashall's party upon it when she signalled it to stop. The car having stopped, she, accompanied by her friend Miss Gillis, stepped upon the platform. Every seat in the car was filled, and the aisle was also filled with people standing up. The evidence of Mrs. Snashall and Miss Gillis tended to show that they did not know the extent to which the car was crowded when they stepped upon it. They could not enter, but stood on the platform near the door. It is 330 feet from the B. & O. depot to a point where the defendant's track made a sudden turn into another street. In turning this curve, of which they had no previous knowledge, Mrs. Snashall and Miss Gillis were both thrown violently from the car, the former having her arm dislocated at the shoulder and sustaining other injuries."

R. R. Co. vs. Snashall, 3 App. D. C., pp. 421-2.

At the trial it was insisted that the plaintiff was guilty of negligence in law because she stood upon the platform. The court say that the plaintiff's riding voluntarily upon the platform was not an obviously dangerous act constituting negligence *per se*, especially where the proof failed to show that the defendant had a rule to the contrary, and does show that the conductor knew of the crowded condition of the car when he stopped it to take the plaintiff on.

Among the prayers asked was the following:

"If the jury should believe from the evidence that there was negligence or the want of reason-

able care upon the part of the plaintiff Emeline in boarding the car of the defendant company in its crowded condition (if the jury find it to have been crowded), their verdict should nevertheless be for the plaintiffs, if they further find from the evidence that the conductor and driver, or either of them, knew or by the exercise of ordinary prudence and care must have known her position on the car, and might by the exercise of reasonable care have avoided the injury."

Of this instruction the court say only this (p. 434):

"The instruction was substantially to the effect that, though the plaintiff may have shown a want of reasonable care, in getting upon the car in its crowded condition, and in attempting to ride upon the platform thereof, still this would not relieve the defendant from liability if, knowing her situation and consequent danger, it might, by the exercise of reasonable care under the circumstances, have prevented injury to her. This instruction does not infringe the general rule, itself well recognized elsewhere in the charge, that there can be no recovery where the negligence of both parties has concurred in producing the injury. It is a qualification of this general rule, *applicable to the facts of the case*, which has the sanction of the highest authority."

In the case of *Georgetown and Tennallytown Railway Co. vs. Smith*, 25 App. D. C., 259, the plaintiff, a passenger on the appellant's railway car, was injured by reason of the protrusion of his arm out of the car window. While in that position his elbow was struck by a car of the same street railway company running in the opposite direction. It appeared that the tracks at the point in question, and generally along the line, were so arranged that cars in passing each other were not more than three inches apart. It further appeared that the panels of the cars were taken out and the running rail

placed where the passengers would naturally rest their arms. It further appeared in the testimony that the motorman of the approaching car which struck the deceased saw him and warned him to take his arm off the rail. The Court of Appeals held, however, that it was not erroneous for the trial court to charge the jury in effect that, even if the deceased was guilty of negligence, if the defendant's servants saw him in a position of apparent danger, it was their duty, notwithstanding his negligence to do all they could to prevent the accident, and if they failed to do so the defendant was liable.

That this prayer was the proper one under the circumstances of the particular case is stated by Mr. Justice Duell delivering the opinion of the court, in the following language (*Georgetown and Tennallytown R. R. Co. vs. Smith*, 25 App. D. C., 259, 274-5):

"The last error is based upon that part of the charge wherein the court said:

"If the plaintiff's intestate was guilty of negligence, and was in a position of apparent peril, and the employees of the defendant company saw that position of apparent peril in time to have prevented the injury, it was their duty, notwithstanding the negligence of the plaintiff's intestate, to do all they could to prevent the accident. If they, in that condition of affairs, failed to exercise due and proper care the plaintiff may still recover.

"I want to make clear to you the other proposition I stated. Notwithstanding the plaintiff's negligence, if the defendant saw that he was in a position of peril by reason of his own negligence, in time to have prevented the accident, and did not do anything that they ought to have done, he could still be allowed to recover, because the direct result of the negligence of the defendant in that case was the cause of the injury. In other words, a man can not run over another if he sees

him in a perilous position, provided he can stop before he does run over him. It is the same way with a railroad company. They could not injure this party if they saw he was there in a perilous position, without undertaking to stop their cars or do something to prevent the accident. If those are the facts, as you find them, the plaintiff may recover.'

"We think that the general proposition laid down in these paragraphs is a correct one, and that the appellant was not harmed by the statements contained therein. In view of the fact that the court left the question of the contributory negligence of the deceased to the jury, and by their verdict it found that the deceased was not guilty of any negligence which contributed to the accident, the charge here objected to amounts to nothing. There was, however, we think, evidence which rendered such instruction proper. The motorman of the approaching car testifies in substance that he saw the deceased, and at least one other passenger, with their arms resting on the rail, and that he warned them to take them in. In view of this it was for the jury to determine under proper instructions whether everything was done to prevent the accident. It was for the jury to determine whether the motorman, seeing the perilous position of the deceased, should not have endeavored to stop his car. We have said that we believe it was negligence on the part of the appellant not to stop one of the cars when two cars were about to pass at the point where the accident occurred."

It is respectfully submitted, however, that the situations presented in the Snashall case, in the Smith case, and in the supposed case have no analogy whatever to the case at bar. Undoubtedly many similar cases can be found in the reports of the various State appellate courts. We think it will appear, however, upon their close consideration, that they involve situations closely

resembling those in the cases that we have just considered. If they should be cited upon the brief of the appellant, counsel will ask permission to file a supplemental brief considering them in detail.

B.

The Defendant Company Owed no Duty of Warning to the Plaintiff.

This proposition is enforced by the following authorities:

In the case of *De Pew vs. New York City Ry. Co.*, 98 N. Y. Supp., 276, 112 App. Div., 260, it was held that:

“While a passenger standing on the front platform of a street car is not guilty of negligence by such fact alone, he, nevertheless, owes to the carrier some precaution either by the manner of standing or by grasping some support to guard against losing his balance by any sudden motion of the car.”

In the case of *Kleffman vs. Dry Dock, etc., Co.*, 93 N. Y. Supp., 741, 104 App. Div., 416, it was held:

“A passenger on a street-car can not voluntarily place himself in a position of danger with knowledge of the fact and then charge dereliction on the street-car company in performing its duty if he could have removed himself from the dangerous position and thus escape injury.”

In the case of *Piper vs. New York Central, etc., Ry.*, 156 N. Y., 224, 41 L. R. A., 724, it was held that:

“Though a passenger of a railroad train had the right to rely upon the performance by the carrier of its duty to exercise the utmost degree of care and skill which human oversight and prudence can suggest, he is not thereby relieved from the duty of using his own sense of sight, hearing, and perception.”

The case of *Bertz vs. Chicago City Ry. Co.*, 116 Ill. App., 554, holds that the law which requires that the

plaintiff shall exercise ordinary care for his own safety and that the defendant shall exercise ordinary care for the safety of its passengers does not change, notwithstanding the facts in particular cases may vary.

In the case of *Craighead vs. Brooklyn City R. R. Co.*, decided in 1890 and reported in 123 New York, page 391, the plaintiff, who was a passenger on one of the defendant's horse cars, while passing along the step on the side of the car, which was an open one, was struck by one of defendant's closed cars coming from the opposite direction.

It appeared from the evidence that the plaintiff had been talking with the conductor upon the car on which the plaintiff and his sister were. When the plaintiff had finished speaking with the conductor he stepped down from the rear platform to the outside step of the car, which ran the entire length of the car. His sister then saw the other car coming along on the down track, and it struck the plaintiff while he was still on the step, turned him around, and knocked him off the car. The plaintiff's sister was looking directly at him at this time, and he was looking at her and was walking along the step from the rear toward the front end of the car, where she was sitting facing the rear. She saw the car strike his head, and she stated positively that he did not slip off the side of the car and fall against the other car.

It appeared that the smallest distance between the tracks at or near this point was such that there was a space between the outside step of the open car and the body of the closed car of at least seventeen inches. The place where the accident happened was a crowded street, and horse cars were continually there passing each other.

The court say (p. 395):

"Upon these facts we can not see how the defendant can be convicted of negligence because it did not have more space between its tracks. For

twenty years such space had been sufficient, although precisely the same opportunities for accidents had arisen many times daily during that period, and yet not one had occurred. Clearly, the accident was one not to be apprehended, and a failure on the part of the defendant to take such measures as would make its happening under any circumstances a physical impossibility can not be said to be an omission of duty. The accident was not to be apprehended, because thousands of passengers on the steps of an open car had uniformly and for twenty years passed in safety the car going in an opposite direction. The body of the plaintiff must, with reference to the car, have been at a most extraordinary and unusual angle at the time of the accident in order that it should have occurred at all. The defendant was not bound to so construct its tracks that it would be impossible for a passenger to be struck by another car while he was standing on the outside of an open one. *There was no negligence on the part of the conductor in failing to prevent the plaintiff from going on the step, or in failing to warn him of any possible danger which might arise therefrom.*"

C.

Defendant's Conductor Had No Right of Control or Restraint of Any Movements of the Plaintiff.

Where a passenger upon a street railway car refuses or neglects to take a vacant seat ready for him in the car and persists in riding upon a platform thereof, the company has no right and is under no duty to compel him to change his position or to go inside the car.

In the case of *Mitchell vs. Chicago G. T. Ry.*, 51 Mich., 236, it was held that railway passengers are presumed to know the every-day incidents of railway travel, and it can not be expected that they are to be treated or put under restraint as if they were children.

In the case of *Bridges vs. Jackson Electric Railway, Light and Power Co.* (38 Southern Reporter, p. 788) the Supreme Court of Mississippi held that where a passenger on a street-car, inside which there is plenty of room, voluntarily leaves his seat and stands on the car platform, and, while the car is running rapidly, attempts to return to his seat by way of the running-board of the car on a side where he knows there are trolley posts, instead of going down the aisle, he thereby assumes all risks arising from the position taken by him. The court say (p. 790):

“The undisputed evidence in this case is that there was plenty of room inside, but appellant voluntarily chose to leave his seat, and not only to take his position on the platform, but waited there until the car was running rapidly; and then, instead of returning by way of the aisle, which would have been perfectly safe, he chooses the more dangerous route, on the side where he knew these posts were, etc. He thereby assumes all the risks arising from the position which he chose to take.”

In this case it was urged that the conductor ought to have prevented the passenger from going along the running-board, and in reply to this the court say (p. 791):

“He (the passenger) was guilty of negligence in exposing himself, without cause, and without the procurement of appellee, to an obvious danger, and was none the less guilty of such negligence simply because the servants of appellee did not fence him off from it. In the case of *Indianapolis R. R. Co. vs. Rutherford* (Ind.), 92 Am. Dec., 336, the court held that the duty of the carrier does not extend to barricading its cars and imprisoning its passengers so as to prevent them; by their recklessness and folly, from voluntarily exposing themselves to needless perils or obvious dangers. Such a doctrine would give power to

railway officials to so restrain the liberty of their passengers in every respect that they could not, by any act of their own, put themselves in unnecessary danger, for such power must necessarily exist if the duty to exercise it exists. The obligation to answer in damages can not be separated from the authority to do what is necessary to avoid liability. Carriers have not, and ought not to have, any such powers, and hence no liability results. Its passengers are not its slaves. Though passengers they are nevertheless free men."

In the case of *Hickey vs. Boston & Lowell R. R. Co.*, 14 Allen, 429, the court say (p. 433):

"If sufficient and suitable provision be made within the cars for all the passengers, the managers of the train are not under obligation to restrict them to their proper places, nor to prevent them from acts of imprudence. If they voluntarily take exposed positions, with no occasion therefore, nor inducement thereto, caused by the managers of the road, except a bare license by non-interference, or express permission of the conductor, they take the special risks of that position upon themselves."

In the case of *Sullivan vs. Capital Traction Co.*, 34 App. D. C., 358, 372-3, the court say on this point:

"Inasmuch as the instructions must have a direct relation to the facts of the particular case, it becomes important at this point to consider certain undisputed facts in the present case. The record discloses that the plaintiff had sustained injuries many years prior to the date of the happening of the accident in question which permanently crippled him. With this infirmity, which rendered him, to some extent at least, incapable of protecting himself in the event of an unusual motion of the cars, plaintiff, at the time of the accident, was standing on the front platform of the rear car, with his back in the direction the

train was moving. He was leaning against the railing enclosing the platform near the opening through which the conductor passes in going from one car to the other. He had taken this position in order that he might smoke; not because the car was crowded or because he could not secure a seat inside. •While it was not contributory negligence *per se* for him to take that position, yet he assumed all the additional risks attendant upon the dangerous place selected. *The high care which a railroad company is required to exercise for the safety of its passengers can be invoked only when the passenger exercises reasonable care in the selection of the best and safest accommodation afforded.* While the railroad company is powerless to prevent a passenger from riding on the platform and is required to exercise reasonable care for the safety of such passenger, the passenger who selects such a position, when ample accommodation is afforded inside the car, assumes the risks attendant thereto in the customary and ordinary operation thereof. The rule as to passengers injured while riding on the platform is well expressed in *Harbison vs. Railroad Company, supra*, as follows: 'The true rule must be that whilst a passenger may ride on the platform, step, or footboard of a car, with the express or implied consent of the carrier, without incurring the imputation of contributory negligence as matter of law, he thereby, however, assumes the increased risk that may result therefrom in the ordinary course of things when the car is properly driven or managed. If hurt during the period of his exposure, he must, in order to recover, show affirmatively that the accident was caused, in whole or in part, by some negligent act of the carrier. *McAfee vs. Huidekoper*, 9 App. D. C., 36; 24 Wash. Law Rep., 366; *Adams vs. W. & G. R. Co.*, 9 App. D. C., 26; 24 Wash. Law Rep., 364; *Stewart vs. Railroad Co.*, 146 Mass., 605.' It is well known that in the ordinary and careful management of street-cars, there is more or less swaying

or lurching in the motion of the cars, not only at curves, but at other points on the tracks. This made the position selected by the plaintiff, especially in his crippled condition, a dangerous one. The accident therefore is not such as could only happen in the ordinary course of things through lack of reasonable care on the part of the defendant or its employees."

In this connection reference is made to case note to the case of *Heinze vs. Interurban Railway*, 21 L. R. A. (N. S.), 715. In this note it is stated that the great weight of authority supports the proposition that, if a street-car passenger go upon the platform or step of the car for the purpose of alighting, after he has requested the conductor to stop the car or the latter has signaled it to stop, and the speed of the car has begun to decrease, it is not such negligence as will preclude a recovery for injuries sustained by being thrown from his position by some negligent act of those operating the car. A great number of cases are cited in support of this proposition. *The effect of these cases is to legalize the position of a passenger who goes upon the platform, or even the rear step thereof, for the purpose of alighting. By what right would the conductor undertake to interfere with a passenger in such position? If a jury should find that such passenger was rightfully in such position, any action of the conductor in interfering with such position would be illegal and a trespass.*

D.

It appears from the plaintiff's testimony (Rec., p. 7) that he was accustomed to riding on street-cars of the kind in question. He says:

"I had been out to dine with my daughter and son-in-law at 3487 Holmead avenue, and I was on my way home. The train was composed of two box cars *similar to those in which I had ridden hundreds of times.*"

E.

The Only Question in the Case is, Was the Defendant Negligent?

As has been repeatedly said, the only theory upon which the case was tried was that the defendant's car was improperly started while the plaintiff was in the act of alighting. The defendant might have raised the question of contributory negligence in case the evidence had shown that the defendant had started its car before the plaintiff had alighted, and that the plaintiff, knowing that the car had started, nevertheless got off of it after it was in motion. But, as has been said; the only evidence tending to show negligence on the part of the defendant excluded contributory negligence on the part of the plaintiff, because his testimony was that the car started and threw him just as he was in the act of alighting. Unquestionably, if the car was at rest and then started while he was in the act of alighting, there could have been no question of contributory negligence on his part. Therefore the prayers offered by both the plaintiff and the defendant are to be considered in the light of the testimony; and that testimony raises only the clear-cut question as to whether or not the defendant negligently started its car while the plaintiff was in the act of alighting. The question is purely that of negligence *vel non* on the part of the defendant.

So clearly was this understood that the plaintiff's counsel did not except to the first two prayers of the defendant, which are as follows (Rec., p. 21):

Defendant's first prayer:

"The jury are instructed that in the case at bar no presumption of negligence arises from the mere happening of the accident in question."
(Conceded.)

Defendant's second prayer (Rec., p. 21):

"The jury are instructed that the burden is upon the plaintiff to prove to the jury by a preponderance of the evidence that the accident in question was due to the negligence of the defendant, and that said negligence was the proximate cause of the plaintiff's injury."

(Conceded.)

Defendant's third prayer (Rec., p. 22):

"The jury are instructed as a matter of law, that in order for the plaintiff to recover in this action against the defendant, he must prove by a preponderance of the evidence that on the occasion in question the defendant's car came to a stop, and that while the plaintiff was endeavoring to alight therefrom it started forward and threw him."

While this prayer was excepted to, nevertheless it is submitted that the granting of it was inevitable, inasmuch as it dealt with the only question raised by the whole testimony in the case, to wit, the question of fact as to whether or not at the time and place in question the defendant's car came to a stop and while the plaintiff was endeavoring to alight therefrom started forward and threw him.

It being conceded that the first prayer of the defendant was correct (Rec., p. 20), there was no presumption of negligence from the mere happening of the accident. The only facts tending to prove negligence of the defendant if the doctrine of the last clear chance does not apply, are those mentioned in the defendant's third prayer. Therefore, the third prayer of the defendant must be correct if the first is, and the correctness of the first is conceded.

Plaintiff's Prayers.

Plaintiff's first prayer (Rec., p. 20):

"You are instructed that the defendant street railway company was bound to exercise the highest degree of care and skill practicable under all the circumstances in this case in caring for plaintiff's safety while a passenger on one of its cars; and if you believe that the plaintiff was injured whilst such passenger, because of the failure on the part of the defendant company to exercise such care and skill, then the plaintiff is entitled to recover in this action."

The first objection to this prayer is that it is in general terms, declaring general principles of law, and making no application of the same to the testimony in the case. It was therefore properly rejected by the trial court.

The learned trial justice, however, in his charge, said to the jury as follows (Rec., p. 22):

"You have heard in the discussion here (with which, however, you have no concern—the discussion before the court) a great deal said about the highest degree of care that must be exercised by a railroad company in respect to its passengers. Now, it is true that they must use the highest degree of care for the safety of their passengers. Every railroad company has that duty laid upon it. But that rule of law must be applied to the facts in each case. The only question in this case is: Did the plaintiff get off that car whilst it was standing still, and whilst he was in the act of getting off, was the car started and was he thereby injured?

"Those conditions require the highest degree of care, to wit, that the defendant company must use the highest degree of care not to start its train until a passenger has alighted. In that respect in this case the highest degree of care must be exercised by the defendant in this case; and therefore

it follows, of course, that if the defendant did not use that care, but started the train (having stopped it and the plaintiff being in the act of getting off) before he did get off, and threw him, then they were not using the degree of care which the law says they must use, and he would be entitled to recover. That is the plaintiff's side of this case."

Plaintiff's second prayer (Rec., p. 20):

"You are instructed that the defendant street railway company is required to do all that human care, vigilance, and foresight can reasonably do, consistent with its mode of conveyance and the practicable prosecution of its business to prevent accident to its passengers when alighting from its cars; if, therefore, you find in this case that plaintiff was a passenger on one of defendant company's cars, and was about to alight therefrom at the regular transfer station at 15th and G streets northwest, and further find from all the facts and circumstances in the case that said defendant company, through its motorman or conductor, or both, knew, or could have known of said plaintiff's intention to alight at this point, and yet failed to exercise the care and vigilance that the occasion demanded to see that said plaintiff alighted in safety, your verdict should be for the plaintiff."

In this connection the plaintiff's third prayer should be considered (Rec., p. 21):

Plaintiff's third prayer:

"Even though you should find that the jerk which precipitated plaintiff to the street was caused by his foot coming in contact with the surface of the street in his endeavor to alight from the car, which was in motion at the time, and not by reason of any sudden jerk or movement of the car; yet, if you further find from all the facts and circumstances in the case that the plaintiff *reasonably* supposed the car to be at rest, and perfectly

safe for him to alight from, and the conductor knowing that he was about to alight from this moving car, gave the plaintiff no warning that the car was still moving, or that it was unsafe for plaintiff to attempt to alight therefrom, and that by reason of this negligence plaintiff was injured, your verdict should be for the plaintiff."

These two prayers have been thoroughly considered under the first caption of this argument. The third prayer is objectionable in addition by reason of the fact it assumes as a fact that there was a "jerk" which precipitated plaintiff to the street, without leaving it to the jury to find whether or not there was in fact any such jerk.

The radical objection, however, to both prayers is that they apply the well-settled doctrine that a common carrier is bound to use extreme care in the conduct of its passengers, to a situation foreign to the doctrine, to wit: A situation in which the defendant is not negligent and the plaintiff is negligent.

To quote again from the charge of the trial justice (Rec., p. 23):

"There is no evidence in this case, and there is no allegation, as I understand it, in this case, which would permit you to say that the conductor, under the law, was compelled to stop the plaintiff in this case when he went out on the platform, and even stepped down on that step. There is no law which would compel the company, in the use of the highest degree of care, to know what the passenger was going to do—whether he was going to wait, when the car was going so slowly that it only went as some say, twelve inches after the plaintiff was thrown, or whether he was going to get off. There is no law which would compel the conductor to know that that plaintiff was going to get off when the car was so near a stop."

Plaintiff's fourth prayer (Rec., p. 21):

"You are instructed that as plaintiff was injured when a passenger of said defendant street railway company, it is necessary for said company, in order to escape liability for injuring him, to show you from all the facts and circumstances in the case and by a preponderance of the evidence, that not only was plaintiff himself negligent, but further that his said negligence directly and efficiently contributed to the production of the injury."

The vices of this prayer are numerous. It assumes that where a passenger of a common carrier is injured, then the defendant must be presumed to be guilty of negligence from the mere fact of injury (although the evidence of the plaintiff himself may show that the defendant was not in fact guilty of any negligence) unless the defendant also shows to the jury by a preponderance of the evidence that the plaintiff was not guilty of contributory negligence. In other words, the prayer ignores the only issue in the case, to wit: The negligence *vel non* of the defendant, and asserts that the only issue in the case is the contributory negligence *vel non* of the plaintiff—an issue not raised by the pleadings or testimony.

It being conceded that no presumption of negligence arises against the defendant from the mere happening of the accident in question (defendant's first prayer, Rec., p. 20), this prayer can not be correct if the conceded prayer is.

The last exception of the appellant (plaintiff below) will be found at page 25 of the record, and is as follows:

Mr. MATHER: "I wish to except to so much of your Honor's charge as restricts the plaintiff to the one theory of this case, and eliminates as a factor in the case whatever of negligence the jury may have found on the part of the defendant in not stopping, or in not saying anything to the plaintiff as he was about to alight from this mov-

ing car. I also wish to except to so much of your Honor's charge as relates to the burden of proof. There was no mention made of the burden shifting to the defendant to show contributory negligence on the part of the plaintiff. Then I also wish to note an exception to so much of your Honor's charge as covers the defendant's third prayer."

The matters stated in this last exception are included in what has already been said, and need no further comment.

Even were there a question of contributory negligence in the case the plaintiff had he desired any instruction from the court on that point should have presented a proper prayer to cover the point.

There are only two possible theories of the case under the evidence. One is that the car started as the plaintiff was alighting. If the jury found this to be the fact they were instructed that the plaintiff was entitled to recover (Rec., p. 22). The other was that the plaintiff alighted from the car as it was slowing down and before it came to a complete stop. In this event the jury were instructed to find for the defendant (Rec., pp. 22, 23). The jury by their verdict for the defendant found the second theory to be correct.

It follows that even if the defendant could be held guilty of negligence, under the view the jury took of the facts the plaintiff was guilty of contributory negligence as a matter of law. If it was negligent to let him get off a moving car, it was in this case equally negligent for him to get off.

It is respectfully submitted that upon the whole record the learned trial justice committed no error, and the judgment below should be affirmed.

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